Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LILLIAN SOLOMON, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
as Receiver for Nassau Savings and
Loan Association, F.A.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the power of the RTC under 12 U.S.C. § 1821(e) to repudiate "any contract or lease" preempts New York's statutory tenancy laws when state law explicitly holds that statutory tenancy obligations are not created by and cannot be altered by any agreement, contract, or lease?

2. Whether the terms "contract" or "lease" in 12 U.S.C. § 1821(e) preempt state housing laws that impose on property owners obligations that are not created by and cannot be altered by any agreement, contract, or lease?

PARTIES

In addition to petitioner Lillian Solomon, Selma Diamond, Ira Kaufman, Peggy Lehman, and Horace Solomon were appellees below and join in this petition. G. Oliver Koppell, Attorney General of the State of New York, Donald Halperin, Commissioner of the Division of Housing and Community Renewal of the State of New York, and the New York State Division of Housing and Community Renewal, were appellees below and are filing their own petition. Lloyd Ribner, as executor of the estate of Muriel Ribner, Susan Solomon Patullo, and Denise Tucker were appellees below and join in the petition of the state officials and agency. Jerome Lederer was an appellee below but is now deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is to be reported at 18 F.3d 111 and is included in the Appendix at pp. 1a-31a. The opinion of the district court that was reversed by the court of appeals is reported at 801 F. Supp. 1152 and is included in the Appendix at pp. 32a-55a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on March 2, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. § 1821(e)(1) provides:

> Authority to repudiate contracts. In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(5) provides:

> Leases under which the institution is the lessor. (A) In general. If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either—
>
> (i) treat the lease as terminated by such repudiation; or
>
> (ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.
>
> (B) Provisions applicable to lessee remaining in possession. If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph—
>
> (i) the lessee—

> (I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;
>
> (II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository institution under the lease after such date; and
>
> (ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i) (II).

Set forth in the Appendix at pp. 56a-64a are pertinent provisions of New York's rent control and rent stabilization laws.

STATEMENT OF THE CASE

This case presents questions of profound practical importance to all residents of rent-controlled housing who, like petitioners, face eviction solely to promote the RTC's overreaching desire for more money. The petition also raises issues of recurring doctrinal significance because of the court of appeals' wholesale rejection of state law requirements based on a strained interpretation of terms in a federal statute that on their face embrace, not reject, state law. Specifically, in the decision below, the court of appeals held that the RTC's power to repudiate a "contract or lease" under 12 U.S.C. § 1821(e), enacted in 1989 by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), preempts state statutory tenancy laws. The court reached this decision even though New York law is quite clear that a property owner's statutory tenancy obligations are not created by and cannot be altered by any contract, lease, or agreement.

The decision below imperils the homes of the ten percent of Americans who live in rent-controlled housing. Thousands of such units are now owned by the RTC or FDIC as receivers for failed savings and loans. But the practical importance of the decision is hardly limited to rent-controlled tenants. The court below effectively acknowledged that the rationale of its decision applies to obligations to provide essential services imposed by state and local housing codes throughout the country, as well as to the nearly universal implied warranty of habitability.

The court of appeals' decision also creates a series of decisional conflicts that warrant this Court's review. First, the Fifth and Seventh Circuits have held that state law is adopted to define what is a "contract" or "lease" under the provision of the Bankruptcy Code, 11 U.S.C. § 365(a), that is the parallel to 12 U.S.C. § 1821(e)(1). Indeed, presently pending before the Court in *O'Melveny & Myers* v. *FDIC*, *cert. granted*, 114 S. Ct. 543 (1993) (No. 93-489), is the similar issue of the extent to which state law defines the "rights . . . of the insured depository institution," and thus of the RTC and FDIC as receiver, under 12 U.S.C. § 1821(d)(2)(A)(i), a provision of FIRREA that is closely related to Section 1821(e)(1). As explained *infra*, at pp. 19-22, at a minimum, the petition for certiorari in this case should be held pending this Court's decision in *O'Melveny*.

Second, the First and Fifth Circuits have held that the word "agreement" under 12 U.S.C. § 1823(e), another related provision of FIRREA, does not include obligations imposed by state law on parties to a contract. Third, in similar fashion, the Seventh and District of Columbia Circuits have specifically held that the terms "contract" or "lease" in 11 U.S.C. § 365(a) do not include obligations imposed by state or local rent control or housing laws. This Court's review is warranted to resolve the conflicts and decide the important issues presented by this case.

A. Factual Background

1. *Petitioners*: The five petitioners are each tenants in rent-controlled or rent-stabilized apartments in 444 East 57th Street, a 45-unit apartment building (the "Building"). For the convenience of the Court, petitioners will focus on Lillian Solomon, whose legal interests are typical of the other petitioners.[1]

Mrs. Solomon has resided in apartment 13F of the Building since 1962. Since before her initial occupancy, apartment 13F has been rent-controlled under New York law. Mrs. Solomon is now over 90 years old and has experienced health problems. In accord with New York rent control law, Mrs. Solomon has no written lease. Rather, as explained *infra*, at pp. 7-9, 20-22, Mrs. Solomon's rights as a rent-controlled tenant are provided for by state statute and regulation.

In 1983, the owner of the Building converted the apartments to cooperative ownership. Pursuant to New York's Martin Act, see N.Y. Gen. Bus. Law §§ 352-e and 352-eeee, Mrs. Solomon had two options. First, she could purchase her apartment as a current tenant at a so-called "insider" price. Under New York law, this price must be lower than the price offered to non-tenant purchasers. In the case of Mrs. Solomon, the reduced tenant price was approximately 59% less than the price offered to non-tenants. R. 364.[2] Mrs. Solomon's second option, provided to her by New York statute and regulation, was to stay in her apartment for as long as she paid the rent-controlled rent. Pursuant to the requirements of New York law, the owner of the Building supplied Mrs.

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[1] Lillian Solomon and Horace Solomon are rent-controlled tenants. The remaining petitioners are rent-stabilized tenants. No party or court in this case has ever suggested that any issue herein turns on whether the tenancy is rent-controlled or rent-stabilized.

[2] References to R. are references to the Joint Appendix filed in the Second Circuit.

Solomon with written offering disclosures that advised her of her two options as guaranteed by New York law.

In view of Mrs. Solomon's advanced age, it is not surprising that she chose to continue to rent her apartment rather than purchase it. Because of the requirements of New York law, her quite reasonable expectation was that she would remain as a tenant and not be evicted from her family home for the remainder of her years so long as she paid her rent-controlled rent. Indeed, Mrs. Solomon testified via affidavit: "At the time I made [my] decision I relied on the representation that my rights as a protected tenant would remain undisturbed and would be unaffected by the change in the nature of the building from a rental to a condominium." R. 343.

Following her decision in 1983, however, a series of events beyond Mrs. Solomon's control led to the decision below. In 1984, the owner of the Building pledged Mrs. Solomon's apartment, along with nine others whose tenants had chosen not to purchase, as collateral for a $3.2 million loan from Nassau Federal Savings and Loan Association ("Nassau S&L"). It is by now familiar that in the mid and late 1980s, real estate values in many parts of the country fell sharply, including the values of New York City apartment buildings. The owner of the Building defaulted in July 1987 on the remaining loan balance of $3,035,711.[3] Nassau S&L purchased the apartments at a foreclosure sale in March 1989, using the loan deficiency as its bid. Under New York law, Nassau S&L succeeded to the owner's rent-control and rent-stabilization obligations concerning the apartments of Mrs. Solomon and the other petitioners.

RTC was appointed receiver for Nassau S&L in 1990. RTC quickly learned that the apartments that Nassau S&L owned in the Building had been appraised at

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[3] One apartment had been released from Nassau S&L's mortgage for payment of $164,229. R. 217.

$2,837,400 as subject to the existing statutory tenancies. R. 233. Sale at that price would have resulted in the recording of a modest loss on the receiver's books. But RTC also learned that the apartments had been appraised at $7,565,000 as vacant and thus, if it could evict Mrs. Solomon and the other statutory tenants, it could receive a substantial profit. *Id.* RTC was also aware that it owned, or would likely come to own, approximately 2200 rent-controlled or rent-stabilized apartments in the New York and New Jersey region, as well as other similar housing units in other regions, including 1000 units in the Atlanta region alone. R. 270, 272, 276.[4]

RTC's Board of Directors determined to bring this case as a "precedent setting" vehicle to establish that "FIRREA empowers RTC to preempt state law in the area of rent control and rent stabilization." R. 269. RTC's Board of Directors chose this case as its "precedent setting" vehicle, notwithstanding that it was informed by RTC officials that "several of the tenants are in their 80's, and at least one is known to be in failing health." *Id.* RTC sent written notice to Mrs. Solomon of its "repudiation and disaffirmance of your lease of the Apartment." R. 251. RTC's notice advised Mrs. Solomon that pursuant to this repudiation she had to vacate her home within 44 days. R. 252.

2. *New York's Rent Control And Rent Stabilization Laws:* New York has had some form of rent control continuously since 1942, when rent control was imposed by federal statute during World War II. See Emergency Price Control Act of 1942, 56 Stat. 23. In 1946, New York state law imposed rent regulation in the form of rent control.

Under the rent control statute and regulations, the rental amount is set and reset biennially pursuant to reg-

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[4] These numbers are for RTC only and do not include similar apartments owned by FDIC as receiver. 12 U.S.C. § 1821(e) applies to both FDIC and RTC receivers.

ulatory guidelines and the tenant has a statutory entitlement to remain in the apartment so long as the statutory rent is paid. N.Y. Unconsol. L. § 8585.1 (McKinney 1987); accord N.Y. City Rent Control Law, N.Y.C. Admin. Code § 26-408.a, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987); N.Y. City Rent and Eviction Regulations § 2204.1, codified after N.Y. Unconsol. L. § 8597 (McKinney 1987). These statutory and regulatory provisions expressly state that the obligations apply to any person who owns the property and to any "tenant . . . notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto." *E.g.*, N.Y. City Rent Control Law § 26-408.a; see also, *e.g.*, N.Y. Unconsol. L. § 8585.1. Under rent control, it is illegal, "regardless of any contract, lease or other obligation . . . for *any person* to demand or receive any rent . . . in excess of the maximum rent." *Id.* (emphasis added).

New York's rent stabilization laws were initially adopted in 1969. The nature of the obligaitons they impose is identical in substance to that of rent control. The rent is set biennially by regulatory guidelines and a tenant may not be evicted "[a]s long as the tenant continues to pay" the regulatorily-set rent. N.Y. City Rent Stabilization Code, N.Y. Comp. Codes R. & Regs. § 2524.1(a), codified after N.Y. Unconsol. L. § 8634 (McKinney 1987). By their terms, New York's rent stabilization laws apply to "owner[s]" and "tenant[s]," not to lessors and lessees. *E.g.*, N.Y. City Rent Stabilization Law, N.Y.C. Admin. Code §§ 26-511.c, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987). The rent stabilization laws use the administrative device of a renewal lease as a trigger for the owner's right to charge the increased rent set by regulatory guidelines. The owner, however, is

legally obligated to provide the renewal lease. See N.Y. City Rent Stabilization Law § 26-511.c(9) ("an owner shall not refuse to renew a lease"). If no renewal lease is provided, by law the tenant remains in the property at the old rental rate and continues to be protected from eviction. See N.Y. City Rent Stabilization Code § 2522.5(b)(2).

B. The Proceedings Below

In February 1991, the RTC brought this action seeking a declaration that it could evict Mrs. Solomon and the other petitioners without complying with New York's statutory tenancy laws. The district court described the issue presented by this case as whether RTC's power under 12 U.S.C. § 1821(e) to repudiate "any contract or lease . . . to which [Nassau S&L] is a party" preempted the obligations imposed by New York's statutory tenancy laws. See App. 39a.

The district court undertook a two-step inquiry. First, the district court examined the nature of statutory tenancy obligations under state law. The district court determined that under both the plain meaning of New York's statutory and regulatory provisions, as well as a number of express decisions of New York courts, the obligations imposed by New York's statutory tenancy laws were a matter of legislative compulsion, not a matter of any obligation created by or pursuant to a contract or lease. *Id.* at 40a-44a. Second, the court held that Section 1821(e) could not properly be "interpreted broadly to include non-lease statutory rights of occupancy" that were not created as an obligation of a contract or lease under state law. *Id.* at 46a-48a. The court concluded that "[t]he RTC cannot enlarge its powers under FIRREA by arguing that Congress' objectives for it were broader than the powers granted by statute." *Id.* at 53a. Accordingly, the district court granted summary judgment for petitioners.

The court of appeals reversed. First, the court held that it was error for the district court to hold that application of Section 1821(e)(1) is controlled by whether petitioner's rights as a statutory tenant were a matter of contract or lease under state law. Instead, the court of appeals held that "the definition of the phrase 'contract or lease' is a matter of federal law." *Id.* at 13a.

Second, the court constructed for Section 1821(e) an interpretation that was explicitly designed "to strengthen RTC's hand in remedying a national economic emergency." *Id.* at 23a. Under this concededly expansive approach, the court held that the statutory rights created by New York's rent control and rent stabilization laws fell within the term "contract or lease" in Section 1821(e) because such rights were "lease-based" or "contract-based." *Id.* at 15a, 20a. The court effectively acknowledged that its reasoning allows RTC and FDIC to repudiate a broad range of state law requirements applicable to landlords, including statutory requirements that landlords provide certain "services" (*id.* at 16a), as well as the "warranty of habitability" that "virtually all states read . . . into residential lease-contracts" (*id.* at 14a).

After holding that a statutory tenancy constituted a "lease" under 12 U.S.C. § 1821(e)(1), the court also rejected an alternative ground for affirmance. Under 12 U.S.C. § 1821(e)(5), a lessee of real property must be allowed to "remain in possession of the leasehold interest for the balance of the term of the lease." Petitioners argued that if a statutory tenancy were construed to be a "lease" under Section 1821(e)(1), then a statutory tenant must be allowed to remain in possession under Section 1821(e)(5) for the "balance of the term of the [statutory tenancy]." The court held that it could not use the term of the "statutory occupancy rights to delimit the leasehold for FIRREA purposes." App. 25a. Accordingly, the court held that "the power of repudiation under section 1821(e) was conferred in aid of an acute financial emergency, and cannot be considered fairly to accom-

modate so prolonged a residual tenancy." *Id.* The Court held that "for purposes of § 1821(e)," the term of the "lease" created by a statutory tenancy is "divide[d] . . . into periods" that ended, in this case, "on the biennial January 1 date on which the landlord next became entitled (following the notice of the repudiation) to a review of the maximum base rent." *Id.* at 26a. Because RTC sent its repudiation notices to petitioners more than two years ago, the decision of the court of appeals would allow the immediate eviction of Mrs. Solomon and the other petitioners.[5]

REASONS FOR GRANTING THE PETITION

I.

This is a case of both great practical and legal importance. As is more fully developed *infra*, at pp. 14-28, four principal factors demonstrate the importance of this case:

• As this Court recently stated, "rent control statutes regulat[e] housing throughout the country." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1528 (1992). Approximately ten percent of all rental housing (2.8 million units) in the United States is covered by rent control. See U.S. Department of Housing and Urban Development Office of Policy Development and Research, *Report to Congress on Rent Control* 1 (Sept. 1991). In addition, numerous States control the renting of space by mobile home parks to mobile home owners. See, *e.g.*, *Yee*, *supra*. Moreover, a number of States regulate the rent charged by railroads to tenants on properties adjacent to the railroads' rights-of-way. See, *e.g.*, *In re Chicago, R. I. & Pac. R.R.*, 772 F.2d 299 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

The failure of hundreds of savings and loans has brought many rent-controlled properties under the own-

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[5] On April 4, 1994, the court of appeals stayed its decision pending this Court's resolution of the petitions for certiorari in this case.

ership of RTC and FDIC receivers. RTC's Board of Directors chose to bring this case as a "precedent setting" vehicle to establish that "FIRREA empowers RTC to preempt state law in the area of rent control and rent stabilization." R. 269. Press reports indicate that the RTC is already moving to use the decision below in support of its efforts to preempt rent control laws and evict tenants in Massachusetts, California, and Connecticut. See "2nd Circuit Adds to Agency Power," *The Thrift Regulator*, Mar. 14, 1994, at 3.

The record in this case reveals that RTC owns approximately 2200 rent-controlled housing units in the New York-New Jersey region, and another, for example, 1000 such units in the Atlanta region alone. See *supra*, at p. 7. The FDIC as receiver of other failed savings and loans obviously also owns a substantial additional number of such housing units. Because the decision at issue in this case is intended by the RTC to set a "precedent" affecting thousands of rent-controlled tenants in various parts of the country, that decision warrants review by this Court, even without regard to the conflicts with other decisions described below.

• Moreover, the effect of the decision below is not limited to rent control laws. The decision below has a breathtaking scope. The court of appeals effectively acknowledged that its rationale would preempt the essential "services" obligations imposed by state and local housing codes in every state. App. 16a. Indeed, the court similarly acknowledged that its rationale would preempt "the warranty of habitability" that "virtually all states . . . read into residential lease-contracts." *Id.* at 14a.

• This Court properly exercises its certiorari jurisdiction to resolve conflicting circuit court interpretations of "related" or "similar," albeit not identical, statutory provisions. *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). This case presents three such conflicts. Indeed, the decision below is contrary to decisions of four other circuit

courts. First, the word "agreement" in 12 U.S.C. § 1823(e), another FIRREA provision, has been held not to include obligations imposed by state law on parties to a relationship initiated by contract. See *Bateman* v. *FDIC*, 970 F.2d 924, 928 (1st Cir. 1992); *Patterson* v. *FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1992). The decision below creates a conflict by holding that the functionally indistinguishable words "contract" or "lease" in 12 U.S.C. § 1821(e) do encompass obligations imposed by state statute.

Moreover, the same words, "contract" or "lease," are used in the provision of the Bankruptcy Code, 11 U.S.C. § 365(a), that authorizes bankruptcy trustees to repudiate contracts and leases. Circuit courts have held that state law should be adopted to determine what legal interests fall within "contract" or "lease" under § 365(a) of the Bankruptcy Code. See *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989). They have also specifically held that obligations imposed by state and local rent control and housing laws are not obligations created by "contract" or "lease" under the Bankruptcy Code. See *In re Chicago, R. I. & Pac. R.R.*, 772 F.2d at 302-03; *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823, 827 (D.C. Cir. 1988). In conflict with these decisions, the court below created a federal law definition for "contract" or "lease" that includes statutory tenancies.

• The decision below also conflicts with prior decisions of this Court. First, this Court has held that when a federal statute uses a term "deeply rooted in state traditions, customs, habits, and laws," *RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946), state law should be adopted to define the term. Plainly "contract" and "lease" are such terms.

Indeed, presently before the Court is the issue of whether "rights . . . *of the insured depository institution*"

under another FIRREA provision, 12 U.S.C. § 1821 (d)(2)(A)(i) (emphasis added), means "rights" under state law. See *O'Melveny & Myers* v. *FDIC*, *cert. granted*, 114 S. Ct. 543 (1993) (No. 93-489). If state law is held applicable in *O'Melveny*, at a minimum, the petition in this case should be granted, the decision below vacated, and the case remanded for reconsideration in light of *O'Melveny* of whether state law should be adopted to define under 12 U.S.C. § 1821(e)(1) whether an interest or obligation is created by a "contract or lease . . . *to which such institution is a party*." (Emphasis added.) See *infra*, at pp. 19-20.

Even if federal law defines what is a "contract or lease" under 12 U.S.C. § 1821(e), the decision below is in conflict with decisions of this Court. In both preemption and Contract Clause cases, the Court has drawn a clear distinction between obligations imposed by state law and obligations imposed by contract. See *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2622 & n.24 (1992) (plurality opinion), *id.* at 2627-31 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in result in pertinent part); *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1109-11 (1992). The decision below entirely collapses this distinction.[6]

II.

This Court has repeatedly held that rent control is "a legitimate exercise of . . . police powers." *Pennell* v. *City*

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[6] The importance of the decision below is reflected in the wide reporting it has received in the legal, thrift and banking, real estate, and general press. *See, e.g., U.S. Law Week*, 62 U.S.L.W. 2566 (Mar. 22, 1994); "2nd Circuit Adds to Agency Power," *The Thrift Regulator*, Mar. 14, 1994, at 3; "Court Rules RTC Can Evict Tenants," *Real Estate Weekly*, Mar. 9, 1994, at 1; "Resolution Trust Wins Rent-Control Case In New York," *Wall St. J.*, Mar. 3, 1994, at B9.

of San Jose, 485 U.S. 1, 12 & n.6 (1988).[7] The Court has also repeatedly held that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone*, 112 S. Ct. at 2617 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The court of appeals simply ignored this cornerstone of this Court's jurisprudence—never even attempting to show a "clear and manifest purpose" of Congress to preempt state rent control and other housing laws.

There are at least two reasonable interpretations of 12 U.S.C. § 1821(e) under which statutory tenancies are not preempted. First, an obligation imposed by state law on a landlord should not be considered an obligation created by "contract or lease" under Section 1823(e) where, as here, state law expressly provides that the obligation is not created by a contract or lease, and indeed applies notwithstanding a contrary contract or lease. See *infra*, at pp. 16-20. Second, even if federal law were used to determine what constitutes an obligation created by "contract or lease," the plain meaning of those words is that an obligation imposed by state law is not an obligation created by contract or lease. See *infra*, at pp. 23-28.

A.

1. The general rule enacted by FIRREA is that RTC as receiver succeeds to the rights and obligations of the failed savings and loan. See 12 U.S.C. § 1821(d)(2)(A)(i), 1821(d)(2)(H).[8] Section 1821(e) provides a limited exception to that general rule, allowing RTC to

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[7] *Accord, e.g.*, *FCC* v. *Florida Power Co.*, 480 U.S. 245, 252 (1987); *Bowles* v. *Willingham*, 321 U.S. 503, 517-18 (1944); *Block* v. *Hirsh*, 256 U.S. 135, 155-57 (1921).

[8] RTC as receiver has the same rights and obligations as FDIC as receiver. 12 U.S.C. § 1441a(b)(4).

"repudiate any contract or lease . . . to which such institution is a party." *Id.* § 1821(e)(1).

This Court has held that when a statute uses a term that is "deeply rooted in state traditions, customs, habits, and laws," the courts should adopt the applicable state law to define that term. *RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946). The Court has thus used applicable state law to define the statutory terms "real property," *id.*, "property and rights to property," *United States* v. *Brosnan*, 363 U.S. 237, 240-42 (1960), and "children," *De Sylva* v. *Ballentine*, 351 U.S. 570, 580-81 (1956). The Court has also adopted state law to "fill the interstices" of a federal statute regulating corporate activities, *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 101-08 (1991), and for "the determination of property rights in the assets of a bankrupt's estate," *Butner* v. *United States*, 440 U.S. 40, 54 (1979).[9] The Court has emphasized that the reasons for adopting state law to define terms or fill interstices in federal statutes are "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98; accord *Brosnan*, 363 U.S. at 242.

The decision of the court of appeals to create a federal law definition for what constitutes a "contract or lease . . . to which such institution is a party" under 12 U.S.C. § 1821(e) is in stark conflict with these prior decisions.[10]

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[9] As *Butner* explained, "[t]he justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, *including the interest of a mortgagee in rents earned by mortgaged property.*" 440 U.S. at 55 (emphasis added). Of course, RTC is the successor to Nassau S&L, the mortgagee of petitioners' apartments.

[10] The district court had applied state law to determine whether a statutory tenancy was a "contract or lease" under Section 1821(e), and petitioners also argued to the court of appeals for application of state law. *See* Brief of Appellees at 21 & n.28. The

First, the words "contract or lease" are quintessentially "deeply rooted in state traditions, customs, habits, and laws." *RFC* v. *Beaver County*, 328 U.S. at 210. Second, there can be no doubt that Mrs. Solomon and the other petitioners, as well as thousands of other tenants who have state statutory rights of some kind, have relied on their state-law created rights. Here, in particular, Mrs. Solomon relied on her state-law rights as a tenant in forgoing an option to purchase her apartment at a reduced price. See *supra*, at pp. 5-6. Because she did not purchase, instead relying on her state law rights, RTC now is in a position to try to evict her from her family home of 35 years. Third, FIRREA contains numerous express federal definitions of a variety of statutory terms. See, *e.g.*, 12 U.S.C. § 1813. Where Congress desired to have a federal definition of a term, it did so expressly. It did not provide such a defintion for "contract or lease" in Section 1821(e).

2. Moreover, the use of federal law to define "contract or lease" in Section 1821(e) is in conflict with numerous decisions using state law to define the exact same words in 11 U.S.C. § 365(a), which allows a bankruptcy trustee to repudiate "any executory contract or unexpired lease of the debtor." The court of appeals conceded that Congress in part modelled 12 U.S.C. § 1821(e) on 11 U.S.C. § 365. See App. 22a (citing S. Rep. No. 19, 101st Cong. 1st Sess. 314 (1989)). But, in conflict with the decision of the court of appeals in this case, other courts of appeals have held that state

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court of appeals miscited two cases in support of creating a federal definition. Each of the cases cited involved nothing more than application of lengthy, express definitions found in the federal statute itself. *See Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 558 (1990) (applying 27-word definitions of "debt" and "claim" in 11 U.S.C. §§ 101(4)(A) and 101(11) (1988)); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 430 (1986) (applying over 100-word definition of "deposit" in 12 U.S.C. § 1813(*l*)(1) (1982)). No provision in FIRREA defines "contract or lease."

law determines the existence and extent of lease obligations or contract obligations under 11 U.S.C. § 365. *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990) ("state law determines whether these contracts constitute unexpired leases subject to Section 365"); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989) ("[i]n determining the significance of the remaining obligations under a contract we look to relevant state law").[11]

It would be absurd for state law to control whether a particular arrangement is a "contract" or a "lease" in bankruptcy proceedings under 11 U.S.C. § 365, but for a federal definition to govern whether the exact same arrangement is a "contract" or a "lease" in receivership proceedings under 12 U.S.C. § 1821(e)(1). *Cf.* Brief for the FDIC, at 26, in *O'Melveny & Myers* v. *FDIC*, No. 93-489 (Government concedes that bankruptcy trus-

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[11] *Accord, e.g., In re Mahoney*, 153 B.R. 174, 176 (E.D. Mich. 1992); *In re Frederick Petroleum Corp.*, 98 B.R. 762, 763 (S.D. Ohio 1989); *In re Powers*, 43 B.R. 112, 114 (E.D. Mo. 1984); *In re Huff*, 81 B.R. 531, 534 (Bankr. D. Minn. 1988); *In re Bertelsen*, 65 B.R. 654, 657 (Bankr. C.D. Ill. 1986); *In re Mesa Refining Inc.*, 52 B.R. 359, 362 (Bankr. D. Colo. 1985). Indeed, under 11 U.S.C. § 365(a), state law has been used to determine that a New York statutory tenancy is not a "contract" or a "lease." *In re Friarton Estates Corp.*, 65 B.R. 586, 592-93 (Bankr. S.D.N.Y. 1986).

The court of appeals did nothing to attempt to reconcile its decision with interpretations in other decisions of Section 365(a) of the Bankruptcy Code. Instead, the court referred to an inapposite provision of the Bankruptcy Code, 11 U.S.C. § 365(h)(1), which provides that the enforceability of a "renewal or extension" of a lease is governed by "applicability nonbankruptcy law." *See* App. 22a. Nothing in the Bankruptcy Code, however, expressly refers to "nonbankruptcy law" as the basis for defining what is a "contract" or "lease" under Section 365(a). Courts have found that such reference to state law is inherent in Section 365(a), and the functional language of Section 365(a) is indistinguishable from 12 U.S.C. § 1821(e)(1). *Compare* 11 U.S.C. § 365(a) ("contract . . . or . . . lease of the debtor") *with* 12 U.S.C. § 1821(e)(1) ("contract or lease . . . to which such institution is a party").

tees are "comparable" to FDIC and RTC receivers). But the decision below creates precisely that conflict. This conflict between circuit decisions on related and similar statutory provisions is a proper ground for certiorari under *Begier* v. *IRS*, 496 U.S. 53, 57 n.2. (1990).

3. The decision below may well conflict with the forthcoming opinion in *O'Melveny & Myers* v. *FDIC*, No. 93-489. At issue in *O'Melveny* is the interpretation of 12 U.S.C. § 1821(d)(2)(A)(i), which provides that the receiver, FDIC or RTC, "succeed[s] to . . . all rights . . . of the insured depository institution." O'Melveny contends that because state law governs the assertion of tort claims and other "rights" by the savings and loan,[12] pursuant to the plain language of Section 1821(d)(2)(A)(i), state law also governs the assertion of these "rights" by the FDIC or RTC. *Cf. Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 585 (1989) ("state law" governs assertion of obligations against FSLIC as successor to savings and loan). Thus, according to O'Melveny, for the RTC or the FDIC to show that it has an enforceable "right" (*i.e.*, tort claim), the RTC or the FDIC must show that the savings and loan itself had an enforceable "right" under governing state law.

Section 1821(e)(1) employs a structure parallel to that of Section 1821(d)(2)(A)(i). Section 1821(d)(2)(A)(i) says that RTC may assert not simply rights, but rather the "rights . . . of the insured depository institution." Similarly, Section 1821(e)(1) says that RTC may repudiate not simply "any contract or lease," but rather "any contract or lease . . . to which such institution is a party." Just as state law should be dispositive in *O'Melveny* because the issue there is the scope of the "rights . . . *of the insured depository institution*," so too here state law should be dispositive because the issue in this case is whether obligations were created "by any

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[12] *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Parnell*, 352 U.S. 29, 33-34 (1956).

contract or lease . . . *to which such institution is a party*." Whether the savings and loan itself had contract or lease obligations is plainly a question on which state law must control.

The Government has informed this Court that because of the broad potential implications of the forthcoming *O'Melveny* decision, savings and loan cases involving issues related but not identical to those in *O'Melveny* should be held for *O'Melveny*, with an eye towards possibly granting those cases, vacating them, and remanding them for reconsideration in light of *O'Melveny*. See Petition for a Writ of Certiorari, *FDIC* v. *Dawson*, No. 93-1486; Petition for a Writ of Certiorari, *FDIC* v. *Cocke*, No. 93-1485. The Government has properly stated that the standard for holding a petition is whether "it is possible that this Court's disposition of *O'Melveny & Myers* v. *FDIC* . . . will shed light on the proper analysis to be used in deciding this case." *Dawson* Petition at 6. There is no doubt that this case satisfies the standard set forth by the Government.

As demonstrated *supra*, at pp. 18-19, *O'Melveny* could well interpret FIRREA in a way that supports application of state law to determine what is a "contract or lease" under Section 1821(e). Here, as the district court held, under New York law, the rights of statutory tenants are not created by contract or lease. To the contrary, as the plain meaning of the pertinent statutory provisions indicates, tenants' statutory rights apply even if (a) there is no existing contract or lease or (b) there is a contract or lease that purports to limit or negate the statutory rights. See *supra*, at pp. 8-9.

New York courts have long held that the occupancy rights of statutory tenants are not created by contract or lease. In *Whitmarsh* v. *Farnell*, 83 N.E.2d 543 (N.Y. 1949), the New York Court of Appeals held that a tenant's

> occupancy of the apartment after his lease expired *was not under any agreement express or implied* but by virtue of a compulsion exerted on the landlord by the local emergency rent law which allowed him to remain in possession.

Id. at 547 (emphasis added). See also *De Santis* v. *White Rose Assocs.*, 578 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 1991) ("the occupants remain in possession *not pursuant to any agreement* with the owner but *solely* by virtue of the emergency rent laws") (emphasis added); *Stern* v. *Equitable Trust Co.*, 144 N.E. 578, 578 (N.Y. 1924) (a statutory tenant "remains in possession, *not by virtue of any agreement, express or implied*, either as to duration of term or amount of rent, *but by virtue of the compulsion which the law exerts* on the landlord to allow him to remain") (emphasis added).[13]

Adoption of New York law would also require reversal of the decision below under 12 U.S.C. § 1821(e)(5). If a statutory tenancy is considered a "lease", New York law defines the term of that tenancy as "*so long as he or she* [*the tenant*] *continues to pay the rent.*" N.Y. City Rent Control Law § 26-408.a; see *130 West 57 Corp.* v. *Hyman*, 66 N.Y.S.2d 332, 334 (N.Y. App. Div. 1946)

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[13] Such holdings fully apply to New York's rent stabilization laws, in addition to New York's rent control laws. *Park Summit Realty Corp.* v. *Frank*, 434 N.Y.S.2d 73 (N.Y. App. Div. 1980), *aff'd*, 448 N.Y.S.2d 414 (N.Y. App. Div. 1981), *aff'd*, 439 N.E.2d 358 (N.Y. 1982), squarely holds that the rent stabilization laws do not create a form of tenancy by agreement:

> The legal theory underlying the notion of a periodic tenancy is that of an implied agreement . . . . Under no view, however, can a lessee who remains in possession at the end of his lease by virtue of the rent stabilization laws be regarded as a periodic tenant. . . . "[[T]he rent] laws extended against the will of the landlord the right of the tenant to remain in possession of [property] . . . . The tenant thus remains in possession, not by virtue of [an] agreement, express or implied . . . but by virtue of compulsion . . . . The tenant stands on his statutory rights . . . ."

434 N.Y.S.2d at 76-77 (quoting *Stern*, 144 N.E. at 578.)

("So long as a tenant continues to pay the rent to which the landlord is entitled he may not be removed from the premises"). The theory underlying the labored construction adopted by the court of appeals, *i.e.*, that the statutory tenancy must be "divide[d] . . . into periods," App. 26a, has been expressly rejected by the New York courts. "Under no view . . . can a lessee who remains in possession at the end of his lease by virtue of the rent stabilization laws be regarded as a periodic tenant." *Park Summit Realty Corp.* v. *Frank*, 434 N.Y.S.2d at 76; see also *Stern* v. *Equitable Trust Co.*, 144 N.E. at 578 ("The tenant does not, by remaining in possession . . . tender an option to allow him to remain as a tenant for any renewed or definite term").

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In sum, prior decisions of this Court, as well as decisions of other circuit courts interpreting the words "contract" or "lease" in related legislation, call for the application of state law in this case. The decision below cannot be squared with those decisions. Moreover, there is a reasonable likelihood that the application of state law here will be strongly supported by the forthcoming decision in *O'Melveny & Myers* v. *FDIC*, No. 93-489.[14] Accordingly, at a minimum, this petition for certiorari should be held pending the decision in *O'Melveny*, and disposed of as appropriate in light of the Court's decision in that case.

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[14] Were this Court to grant review, set this case for argument, and decide that state law is to be adopted, the Court would have three further options. First, the Court could agree with the district court that petitioner prevails under state law. *See, e.g., Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956); *West* v. *AT&T*, 311 U.S. 223, 238-39 (1940). Second, the Court could remand the state law issue. *See Miree* v. *DeKalb County*, 433 U.S. 25, 33 (1977). Third, this Court or the court below could certify the state law issue to the New York Court of Appeals. *See*, N.Y. Const. art. VI, § 3(9).

B.

Even if federal law were to supply its own definition of "contract or lease" in 12 U.S.C. § 1821(e)(1), the decision of the court of appeals would also merit this Court's review. The court of appeals proffered an interpretation of "contract or lease" that is contrary to the plain meaning of the statute and in conflict with prior decisions of both this Court and a number of courts of appeals.

1. The court of appeals treated "contract or lease" in Section 1821(e)(1) as if each were a relatively new word in our legal lexicon. Of course, these terms are not new. These words have settled meaning acquired over many years of legal interpretation, and it is this received understanding which Congress is "presumed" to have adopted. *E.g., Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989).

Black's Law Dictionary defines "contract" as "[a]n *agreement* between two or more persons which creates an obligation to do or not to do a particular thing." *Black's Law Dictionary*, 291-92 (5th ed. 1979) (emphasis added). Similarly, a "lease" is defined as "[a]ny *agreement* which gives rise to relationship of landlord and tenant (real property) or lessor and lessee (real or personal property). . . . *Contract* for exclusive possession of lands or tenements for determinate period." *Id.* at 800 (emphasis added). It is thus black letter law that a "contract" or "lease" obligation is one created by agreement. The obligations imposed by New York's statutory tenancy laws are obviously not created by any agreement. To the contrary, New York's statutory tenancy obligations exist even if there is no agreement, or if there is a contrary agreement. See *supra*, at pp. 8-9, 20-21. To define these statutory obligations as obligations created by "contract or lease" certainly deprives those words of their natural, indeed plain, meaning.[15] Here, for example, New

[15] Perhaps even more absurd is the court of appeals' decision that a statutory tenancy is a "lease" under 12 U.S.C. § 1821(e)(1)

York's statutory rent control laws allow Mrs. Solomon to retain possession without a written lease. And New York's statutory rent stabilization laws allow other petitioners to remain in possession despite provisions in their written leases that state that the leases have long since expired. See, *e.g.*, R. 362 ("your lease expires on Sept. 30, 1987").

Congress plainly understood the term "contract or lease" in 12 U.S.C. § 1821(e)(1) to encompass only

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but the term of the statutory tenancy is not "the term of the lease" for § 1821(e)(5). This result-driven approach is flatly contrary to "[t]he normal rule of statutory construction [that] assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal quotations omitted).

The court of appeals' contradictory constructions of the two paragraphs of § 1821 cannot be defended, as the court of appeals attempted (*see* App. 25a-26a), as necessary to prevent a taking. First, RTC as successor is asserting the rights of Nassau S&L. *See supra*, at pp. 6-7, 19. Nassau S&L acquired a lien on rent-regulated apartments in 1984 and purchased those same apartments at a foreclosure sale in 1989. *See supra*, at p. 6. Both of these transactions occurred long after New York enacted its rent control and rent stabilization laws. The application of a statute to a property interest acquired *after* enactment of the statute simply cannot be a taking. *See, e.g., United States* v. *Security Indus. Bank*, 459 U.S. 70 (1982); *see also Landgraf* v. *USI Film Prods.*, slip op. at 21 (U.S. Apr. 26, 1994) (the Takings Clause is an "antiretroactivity" provision). Second, even if New York's laws were retroactively applied—an unlikely prospect given their longevity—there would be no taking because the initial renting to the tenant is consensual and landlords have opportunities to withdraw properties from the rental market. *See Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1528-29 (1992); *Rent Stabilization Ass'n* v. *Higgins*, 1993 WL 524208, at *6 (N.Y. 1993) ("[a]n owner's right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains"), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1490); *Dawson* v. *Higgins*, 1994 N.Y. App. Div. LEXIS 3295, at *13 (N.Y. App. Div. 1944) ("[t]he rent-control provisions . . . plainly do not require a landlord to remain in the rental market in perpetuity").

obligations created by agreement. Thus, Section 1821 is replete with references to terms from the law of contract that have no meaning when applied to obligations imposed by statute or regulation. See, *e.g.*, § 1821(e)(1)(A) (receiver may "*disaffirm* or *repudiate* any contract or lease"); (emphasis added); *id.* § 1821(e)(1)(B) ("performance"); § 1821(e)(5)(A) ("written lease"; "default"); § 1821(e)(5)(A)(i) ("terminated"); § 1821(e)(5)(A)(ii) ("term of the lease"); § 1821(e)(5)(B)(i)(I) ("the contractual rent"). Section 1821(e) was plainly intended to provide some protection from imprudent agreements of the savings and loan, not from the generally applicable economic and social laws and policies of a given State. When Congress wanted to preempt the obligations or requirements of state law, it did so expressly. See, *e.g.*, 12 U.S.C. §§ 1464(p), 1821(m)(10), 1823(k)(1)(A)(i). It did not do so here.

2. The decision of the court of appeals is also in conflict with decisions of this Court expressly distinguishing obligations imposed by state law from obligations imposed by contract. Two terms ago, in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Court interpreted a statutory provision preempting certain "requirement[s] . . . imposed under State law." See *id.* at 2619. A four-justice plurality held that "a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under State law.*'" *Id.* at 2622 (emphasis in original); see also *id.* at 2622 n.24 ("common understanding dictates that a contractual requirement, although only enforceable under state law, is not 'imposed' by the state, but rather is 'imposed' by the contracting party on itself"). The three-justice concurrence would have gone even further and held that neither tort nor contract obligations were "imposed under State law." See *id.* at 2627-31. The decision below cannot be reconciled with *Cipollone*.

It is also in conflict with this Court's interpretation of the Contract Clause. In *General Motors Corp.* v. *Romein*,

112 S. Ct. 1105 (1992), the Court held that a state law imposing obligations on employers different from those in their contracts with their employees did not become part of the contract; thus, the state law could later be amended without violating the Contract Clause. *Id.* at 1109-11. The decision below is in obvious conflict with *Romein*. Indeed, the rationale of the Second Circuit has the consequence (presumably unintended) that if New York were to repeal its rent regulation laws, this action would violate the Contract Clause.

The decision below is also in conflict with this Court's takings jurisprudence. Under *Armstrong* v. *United States*, 364 U.S. 40 (1960), when state law creates a property interest and the federal government obliterates that interest for the Government's "own advantage," there is a taking. *Id.* at 48-49. Here, the court below has adopted an interpretation that allows RTC to extinguish petitioners' state law-created tenancy rights for the Government's "own advantage"—an obvious taking under *Armstrong*.[16] This Court has held that federal statutes must be construed to avoid possible takings, see *United States* v. *Security Indus. Bank*, 459 U.S. 70, 76-82 (1982), and the court below ignored this responsibility.

3. The decision of the court below is also in conflict with interpretations of "related" and "similar" statutory provisions by four other circuit courts. *Cf. Begier* v. *IRS*, 496 U.S. at 57 n.2. First, under 12 U.S.C. § 1823(e), a related provision of FIRREA, a person cannot assert an unwritten or unrecorded "agreement" as a claim or defense against the FDIC or the RTC. The FDIC and the RTC have repeatedly asserted that "agreement" under Section 1823(e) encompasses property interests created

[16] *See also Lynch* v. *United States*, 292 U.S. 571, 579-80 (1934) (federal government's repudiation of its own contractual obligation is a taking); *cf. United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) (constitutional scrutiny of deprivation of property increases "where the Government has a direct pecuniary interest in the outcome of the proceeding").

by state law in favor of persons who initially entered into contractual relationships. The Government's interpretation of "agreement" in Section 1823(e) is thus equivalent to its interpretation of "contract" or "lease" in Section 1821(e). The First and Fifth Circuits have rejected this interpretation in the context of Section 1823(e).

Specifically, in *Bateman* v. *FDIC*, 970 F.2d 924, 927-28 (1st Cir. 1992), the court held that a state-law mechanic's lien created in favor of a contractor who did work with the owner's "consent" was not an obligation created by "agreement" under Section 1823(e). Similarly, the court in *Patterson* v. *FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1990), held that a statutory homestead interest given to a property owner is not an interest created by "agreement" under Section 1823(e).[17]

Second, the decision below is also in conflict with two circuit court decisions holding that the words "contract" or "lease" in 11 U.S.C. § 365(a) do not apply to obligations imposed by state rent control or other state housing laws. *In re Chicago, R. I. & Pac. R.R.*, 772 F.2d 299, 302-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), held that a bankruptcy trustee must comply with state rent control laws even *after* a lease is repudiated by

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[17] *See also New Bank* v. *Callahan*, 798 F. Supp. 73, 77 (D.N.H. 1992) (abuse of process claim not based on an "agreement" since "obligation to refrain from abuse of process is one that arises from state law"; "legal obligations [that] are presumed to be part of every contract" do not come within "agreement" under § 1823(e)); *RTC* v. *Ford Mall Assocs.*, 796 F. Supp. 1233, 1239-40 (D. Minn. 1992) ("[m]echanics' liens . . . depend on the operation of state law" and to consider them "agreements" would "effectively eliminate the agreement requirement"); *Bascom Constr., Inc.* v. *FDIC*, 777 F. Supp. 123, 126 (D.N.H. 1991) (mechanic's lien based on state law "does not constitute an 'agreement' [under] 1823(e)"); *Kile* v. *FDIC*, 641 F. Supp. 723, 726 (E.D. Tenn. 1986) (in lien priority dispute involving first-to-record statute, "the Bank did not become subordinate by any agreement, but by operation of state law").

the trustee.[18] In *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 884 F.2d 823 (D.C. Cir. 1988), the court held that the words "contract" or "lease" in § 365 did not "implicate public obligations." *Id.* at 827. As a matter of law, the court held, obligations imposed by local housing statutes, such as providing utilities and essential services, are "independent" of private leases. *Id.* The bankruptcy trustee's power to reject a "contract" or "lease" only covered "lease covenants [that] go beyond the requirements of law (for example, providing for a doorman, indoor parking, and the like)." *Id.*

Under the decision below, state statutory rent control and housing obligations, which are not part of the "contract" or "lease" that may be repudiated in bankruptcy proceedings, are part of the "contract or lease" in receivership proceedings. Such an outcome is nonsensical and this decisional conflict warrants this Court's review. The rights of thousands of tenants are too important to be left to the happenstance of which federal judicial circuit they reside in.

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[18] Below, the RTC attempted to distinguish the result in bankruptcy cases based on 28 U.S.C. § 959(b), which provides: "Except as provided in section 1166 of title 11 [railroad reorganizations], a trustee, receiver, or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b) cannot be used to distinguish bankruptcy cases for at least two reasons. First, *In re Chicago, R. I. & Pac. R.R.* is a railroad reorganization case to which 28 U.S.C. § 959(b) expressly does not apply. Second, Congress expected that the power of the FDIC and RTC to repudiate contracts would extend no further than that of a receiver in equity. *See* H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 397 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 436 (FIRREA "grants the FDIC as conservator or receiver certain rights and powers of a receiver in equity, including the right to repudiate contracts"). Of course, a receiver in equity is subject to Section 959(b).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted. In the alternative, the petition should be held pending the Court's decision in *O'Melveny & Myers* v. *FDIC*, *cert. granted*, 114 S. Ct. 543 (1993) (No. 93-489), and then disposed of as appropriate in light of the Court's decision in *O'Melveny*.

Respectfully submitted,

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May 4, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 92-6244

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,
Plaintiff-Appellant,

v.

SELMA DIAMOND, IRA KAUFMAN, JEROME LEDERER, PEGGY LEHMAN, SUSAN SOLOMON PATULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, HORACE SOLOMON, LILLIAN SOLOMON, DENISE TUCKER, ANGELO APONTE, Commissioner of the Division of Housing and Community Renewal of the State of New York, and ROBERT ABRAMS, Attorney General of the State of New York,
Defendants-Appellees,

and

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Appellee.

December 20, 1993, Argued

March 2, 1994, Decided

JUDGES: Before: PRATT, McLAUGHLIN and JACOBS, Circuit Judges.

OPINION

JACOBS, Circuit Judge:

Resolution Trust Corporation ("RTC") is a government corporation that acts as receiver or conservator for federally-insured thrift institutions in financial distress. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), directs RTC to realize a maximum recovery on the value of the thrift assets that come into its possession, and has conferred on RTC a number of extraordinary powers to help it in doing so. Among the powers granted to RTC by Congress is the power to disaffirm or repudiate the contracts or leases which it finds to be burdensome. RTC came into possession of nine occupied condominium apartments located at 444 East 57th Street in New York City, and has sought to disaffirm or repudiate the nine tenancies, each of which is subject to local and state rent regulation. The United States District Court for the Southern District of New York (Carter, J.) granted summary judgment to the tenants and New York State and denied summary judgment to RTC on the ground that the tenancies in question, by virtue of the rent regulation laws, are "statutory" tenancies rather than leases or contracts subject to disaffirmation or repudiation by RTC. We hold that these tenancies are founded upon contract and lease obligations subject to the disaffirmation and repudiation power of RTC, and we therefore reverse.

BACKGROUND

A. FIRREA and RTC

RTC was created by Congress in 1989 as part of a comprehensive legislative initiative to mitigate a financial crisis that had engulfed the thrift industry and the Federal Savings and Loan Insurance Corporation ("FSLIC"). H.R. Rep. No. 54(I), 101st Cong., 1st Sess. (1989), reprinted in 1989 U.S.C.C.A.N. 86, 98. The Government

Accounting Office had estimated that FSLIC's operating deficit was $56 billion at the end of 1988. Id. at U.S.C.C.A.N. 100; see also S. Rep. No. 19, 101st Cong., 1st Sess. 2 (1989) ("Current estimates of the remaining cost to the Federal deposit insurance system of resolving the problem range from $50 billion to more than $150 billion . . . .").

FIRREA, adopted on August 9, 1989, Pub.L. No. 101-73, 103 Stat. 364 (codified in scattered sections of 12 U.S.C.), "constituted emergency legislation" to stop the financial hemorrhaging. S.Rep. No. 19 at 3. As the House Report puts it: "The interests of the American taxpayer demand an expedited resolution to the monumental problems involved with the unprecedented costs of dealing with hundreds of insolvent thrifts and the orderly disposition of the assets of these failed institutions." H.R. Rep. No. 54(1) at U.S.C.C.A.N. 104. RTC, a "wholly-owned government corporation," was created "to manage and dispose of the assets acquired from failed thrifts." *Id.*

RTC's primary purpose is to act as conservator or receiver for failed thrift institutions. 12 U.S.C. § 1441a (b)(3)(A) (1989 & Supp.). Congress required that RTC conduct its operations "in a manner which [] maximizes the net present value return from the sale or other disposition of" thrift assets that come into its hands. 12 U.S.C. § 1441a(b)(3)(C)(i); see also S.Rep. No. 19 at 352 (Congress intended that RTC "conduct its operations so as to maximize recovery on assets it acquires, make efficient use of funds it obtains . . . and minimize losses incurred in resolving cases.").

To help RTC in carrying out this mandate, Congress armed it with the power to disaffirm or repudiate contracts or leases that RTC in its discretion determines to be burdensome. 12 U.S.C. § 1821(e)(1) (made applicable to RTC by 12 U.S.C. § 1441a(b)(4)(A)). The reach of that power is the primary issue on this appeal.

B. Rent Regulations

Owners of residential rental property in New York City have been subject to some form of rent regulation for over fifty years. Originally imposed by the federal government during World War II (Emergency Price Control Act of 1942, Jan. 30, 1942, ch. 26, Title I, § 1, 56 Stat. 23), rent controls were continued by state legislation in 1946 (Emergency Housing Rent Control Law, L. 1946, c. 274 (codified at N.Y. Unconsol. Laws §§ 8581-8597 (McKinney 1987))). Since 1962, the City of New York has enforced its own local rent regulations, which (like the federal and state measures) regulate rents and evictions in privately owned residential housing. Admin. Code of City of N.Y., §§ 26-401-415 (reported following N.Y. Unconsol. Law § 8617 (McKinney 1987)) ("N.Y.C. Admin.Code"). Authorized by the State Legislature, these City laws were enacted pursuant to a City Council finding

> that a serious public emergency continues to exist in the housing of a considerable number of persons in the city, which emergency was created by [World War II], the effects of war and the aftermath of hostilities . . . [and therefore] such action, as a temporary measure to be effective until . . . such emergency no longer exists . . . [requires the council to intervene] to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements. . . .

N.Y.C. Admin.Code § 26-401. This finding of emergency was renewed most recently by L.1985, c.907 (effective Sept. 1, 1986).

Currently, there are two systems of rent regulation in New York: rent control and rent stabilization. Some of the nine rent-regulated condominium units at issue are rent controlled; the others are rent stabilized.

The maximum rent for each rent-controlled property is set by an administrative board on a biennial basis. N.Y.C.

Admin.Code § 26-405a(4), N.Y. Comp. Codes R. & Regs. tit. 9, § 2201.5(a) ("9 NYCRR § ——"). Upon certain enumerated contingencies, such as an increase in operating expenses, a landlord may petition the rent control board for an extraordinary increase. N.Y.C. Admin. Code § 26-405g, 9 NYCRR § 2202. So long as the tenant continues to pay the regulated rent, the landlord may not institute eviction proceedings. N.Y.C. Admin. Code § 26-408a. Rent control does not require or contemplate a current written and signed lease. In this way, the rent-controlled tenancy survives the lease-term of the original lease instrument (and any written renewals thereof), and becomes a so-called "statutory" tenancy. See, e.g., *W.T. Associates v. Huston,* 123 Misc. 2d 24, 472 N.Y.S. 2d 562, 564 (Sup. Ct. 1984).

The second program—rent stabilization—was adopted in 1969 in response to a perceived failure of rent control to adequately relieve the wartime housing emergency. N.Y.C. Admin.Code §§ 26-501-520 (McKinney 1987); see *8200 Realty Corp. v. Lindsay,* 27 N.Y.2d 124, 313 N.Y.2d 733, 742, 261 N.E.2d 647 (1970). Unlike rent control, rent stabilization does require and contemplate a current written lease-contract, 9 NYCRR § 2522.5, and requires the landlord to offer a renewal lease to the tenant before the end of each lease term. N.Y.C. Admin. Code § 26-511c(4), 9 NYCRR § 2522.5(b)(1). In that way, the rent-stabilized tenant, like his rent-controlled neighbor, enjoys occupancy for so long as he wishes. The City's rent guidelines board regularly fixes the maximum rent increase for one-year and two-year leases, N.Y.C. Admin.Code § 26-512, the allowable percentage increase being based in part on market conditions. N.Y.C. Admin. Code § 26-510b, 9 NYCRR §§ 2521-22. It was thought that by adopting a regulatory scheme more sensitive to market prices, and giving property owners (at that time) a choice between rent control and stabilization, new construction would flourish and the persistent housing emergency would abate. *8200 Realty Corp.,* 313 N.Y.S.2d at

742-43. However, the wartime housing emergency has been found to continue to this day, leaving most rental properties in New York subject to what the state's Court of Appeals once characterized as "an impenetrable thicket, confusing not only to laymen but to lawyers." In *Matter of 89 Christopher, Inc. v. Joy*, 35 N.Y.2d 213, 360 N.Y.S.2d 612, 618, 318 N.E.2d 776 (1974).

C. Martin Act

Rent regulation is also implemented by certain provisions of New York's blue sky law, the Martin Act. N.Y. Gen. Bus. Law, Art. 23-A, §§ 352-359-h (McKinney 1984). Essentially an antifraud securities statute, see *Abrams v. Long Beach Oceanfront Associates Limited Partnership*, 136 Misc. 2d 137, 518 N.Y.S.2d 323, 325 (N.Y. Sup. Ct. 1987), the act regulates (inter alia) the offer and sale of securities evidencing an ownership interest in residential real property that has undergone a conversion to condominium or cooperative ownership. When the owner of an apartment building proposes such a conversion, the Martin Act mandates the inclusion of certain disclosures in the various offering documents. Among other things, the offeror is required to disclose the conditions under which eviction proceedings may be instituted against non-purchasing tenants, and the extent to which state and local rent-regulations will continue to apply to such tenancies. N.Y. Gen. Bus. Law § 352-eeee2(c).

In any conversion of a residential building to cooperative or condominium status, the offer or sale of the underlying securities is illegal unless the offering statement has been filed with the State Attorney General. N.Y. Gen. Bus. Law § 352-el(a). No offer is considered to have been officially filed without a letter from the State Attorney General to the offeror certifying that the offeror has complied with all relevant provisions of the Martin Act. N.Y. Gen. Bus. Law § 352-e2. The Attorney General is directed to withhold the letter of certification until

he finds that the offering materials comply with the Martin Act, including the disclosures concerning the treatment of non-purchasing tenants. N.Y. Gen. Bus. Law § 352eeee2.

D. The Tenancies

The individual appellees in this case are tenants in a residential building at 444 East 57th Street in New York City. Appellee Lloyd Ribner claims status as a tenant, which RTC disputes—a collateral issue we address in a separate section of this opinion. Since we reverse the order dismissing RTC's complaint against Ribner, this opinion is fully applicable to him, except to the extent we indicate otherwise.

In 1983 the building underwent a conversion to condominium ownership, pursuant to a "non-eviction" plan under the Martin Act. N.Y. Gen. Bus. Law § 352-eeee2 (c). In accordance with the disclosure requirements of this statute, non-purchasing tenants, including the nine appellees in this case, were informed in the conversion plan offering documents that they could remain in their apartments, that (pursuant to this plan) they would not be evicted, and that any rent regulations governing their tenancies would continue to apply after the conversion was complete.

E. RTC's Repudiation

In or about 1984, the plan sponsor pledged these nine apartments to Nassau Federal Savings and Loan Association as collateral for a loan of $3.2 million. When the sponsor defaulted in the summer of 1987, title to the nine apartments passed to Nassau Federal S & L. Pursuant to FIRREA, the Office of Thrift Supervision ("OTS") appointed RTC receiver of Nassau Federal S & L in March 1990. RTC then reorganized Nassau Federal S & L as a new thrift institution called Nassau Savings and Loan Association, F.A. At about the same time, OTS

appointed RTC conservator of this new institution. On November 16, 1990, OTS issued Resolution Number 90-2003, providing that Nassau Savings and Loan would be closed, and appointing RTC as receiver. RTC is now responsible as receiver for disposing of the assets of this now-closed institution in a manner consistent with the requirements of FIRREA.

RTC sent the tenants two letters of repudiation, the first as conservator, the second as receiver. In the summer of 1990, RTC as conservator determined it was suffering a net operating loss as landlord of these nine units. On the basis of that loss (which was later calculated to be approximately $18,924 per month), RTC determined that the nine tenancies were burdensome within the meaning of 12 U.S.C. § 1821(e)(1)(B), and notified each tenant in writing that RTC was repudiating the tenancy. It further advised that, pursuant to FIRREA, each tenant had the option of (a) treating the tenancy as terminated, (b) remaining in possession for the balance of the lease-term, or (c) purchasing the unit on stated terms.[1]

The nine tenants rejected the alternative offers made by RTC, and disputed RTC's power to repudiate their tenancies. Several of them filed complaints against RTC with the New York Division of Housing and Community Renewal ("DHRC"), to which complaints RTC responded that DHCR was "without jurisdiction over the RTC and this matter." The New York Attorney General then protested by letter to RTC that it had exceeded its power in repudiating tenancies protected by New York's Martin Act and the various rent laws and regulations. In response to the concerns raised by the Attorney General, RTC adopted a policy statement assuring New York that

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[1] Ribner contends that any such correspondence was sent to his deceased mother, Muriel Ribner. As we discuss below, with respect to this individual, that contention has no material effect on this appeal.

RTC would not repudiate the leases of low-income and moderate-income tenants. See RTC Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulations (February 22, 1991) ("Statement of Policy"). In its second letter to the tenants, RTC advised that, pursuant to its Statement of Policy, no tenant of low-income or moderate-income would be subject to lease repudiation. The Statement of Policy declares that RTC will not repudiate the tenancy of any "individual whose income does not exceed 115% of the median income in the area involved, as determined by the U.S. Secretary of Housing and Urban Development, with adjustments for family size." Counsel for the New York Attorney General estimated at oral argument that the Statement of Policy would protect New York City residents with income (before family size adjustments) of up to approximately $45,000. It does not appear from the record, nor does any appellee contend, that any of the nine tenants at 444 East 57th Street are persons of low or moderate income.

F. Procedural Events

On February 25, 1991, RTC filed a complaint naming as defendants the nine individual tenants, as well as Angelo Aponte (Commissioner of DHCR), and Robert Abrams (Attorney General of the State of New York). The complaint sought a declaration that RTC has the power to repudiate the tenancies in question, and an order of eviction against Ribner, who (the complaint alleged) holds no valid interest in the tenancy of his mother's apartment. RTC sought other relief as well, which we expressly decline to address. Soon thereafter, the Attorney General and DHCR filed a complaint against RTC, alleging that RTC lacked the statutory authority to pursue its claims, and requesting declaratory and injunctive relief against RTC. These actions were subsequently consolidated.

In February 1992, the parties filed cross-motions for summary judgment: RTC requested that the district court grant it the relief prayed for in its complaint; the Attorney General and DHCR asked for a declaration that RTC lacked authority to evict "non-purchasing, rent-controlled or rent-stabilized tenants from condominium or cooperative units in buildings converted to condominium or cooperative status under a non-eviction plan filed . . . pursuant to [the Martin Act]," and also requested a permanent injunction barring RTC from pursuing its claims. In addition, Ribner moved to dismiss RTC's complaint against him, and defendant Susan Patullo filed a motion to either dismiss RTC's complaint or, in the alternative, grant her summary judgment. (Patullo's motion apparently was never addressed below.) On August 21, 1992, after full briefing and argument, the District Court issued an opinion (a) granting New York's motion, (b) denying RTC's motion, and (c) granting Ribner's motion to dismiss the complaint against him. *Resolution Trust Corp. v. Diamond,* 801 F.Supp. 1152 (S.D.N.Y. 1992).

In its opinion, the district court framed and answered two questions: "1) whether the tenants in this case have occupancy rights by virtue of leases or instead pursuant to statutory tenancies independent of any leases; and 2) if these rights derive from statutory tenancies, whether the 'any contract or lease' language of section 1821(e)(1) empowers the RTC to repudiate statutory tenancies . . . ." 801 F. Supp. at 1157. In addressing the first question, the district court examined the rent control and rent stabilization programs, as well as the Martin Act, and determined that tenants under these various schemes "enjoy occupancy rights that are independent of any lease they may have with their landlords, in this case the RTC." 801 F. Supp. at 1159. It then held that, because the nine tenants enjoy "rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant," those rights cannot be repudiated under "the plain language" of FIRREA authorizing RTC

to repudiate "any contract or lease." 801 F. Supp. at 1161.

Having held that these tenancies were not within the scope of the express language of the statute, the district court went on to address RTC's alternative argument that there is an irreconcilable conflict between the state laws and FIRREA, such that application of the state regulations would obstruct RTC's operation under FIRREA. Applying "conflict preemption" analysis, the district court concluded that insofar as the statute did not expressly include "statutory" tenancies within its scope, it could not be construed to grant RTC any power with respect to these tenancies: "since the power prohibited by state law in this case was never granted to the RTC in the first place, no preemption of state law is possible here." 801 F. Supp. at 1164. Finally, the district court refused to grant summary judgment to either side on RTC's claim against Ribner, but did grant Ribner's motion to dismiss the complaint against him.

On appeal, RTC asserts express authorization in FIRREA allowing RTC to repudiate rent-regulated tenancies that it determines to be burdensome. RTC also argues that New York's rent regulations directly conflict with RTC's statutory mandate to maximize asset values and that, because compliance with both the state and federal laws is—with respect to these tenancies—impossible, the Supremacy Clause of the Constitution requires a finding that RTC's power to repudiate the leases of "non-needy" tenants preempts any non-federal rent regulation. We hold that these tenancies are grounded in a contract or lease and therefore fall within the express language of FIRREA and its grant to RTC of the power to repudiate "contracts or leases." Because we find that repudiation of these tenancies is within the scope of the express statutory grant of power to RTC, we find it unnecessary to reach the issue of "conflict preemption."

Accordingly, we reverse the district court's order, and direct that judgment be entered for RTC as to its power

of repudiation. With respect to Ribner, we find that, although the district court was correct in denying the cross-motions for summary judgment, RTC did state a claim upon which relief may be granted, and we therefore vacate the dismissal of RTC's complaint against Ribner and remand for further proceedings.

ANALYSIS

A. FIRREA

RTC's power to repudiate contracts and leases was conferred by Congress as a tool for maximizing net asset values. The power is described in section 11 of the Federal Deposit Insurance Act ("FDIA"):

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in [its] discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in [its] discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1). FIRREA expressly applies this provision to RTC. 12 U.S.C. § 144*a*(b)(4)(A). It is unquestionable that this provision grants RTC full discretionary powers to disaffirm or repudiate any burdensome executory contract or lease. See, e.g., *Resolution Trust Corp. v. CedarMinn Building Ltd. Partnership*, 956 F.2d 1446, 1456 (8th Cir.), cert. denied, 121 L. Ed. 2d 56, 113 S. Ct. 94 (1992). This apeal therefore turns on whether the tenancies in question are contractual in nature or whether the various rent regulations transformed these tenancies into some non-contractual, non-leasehold

property interest such that they are outside the scope of the statute.

For these reasons, the definition of the phrase "contract or lease" is a matter of federal law. See, e.g., *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 557-8, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990) ("Our construction of the term 'debt' [in the Bankruptcy Code] is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself."); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 431, 90 L. Ed. 2d 428, 106 S. Ct. 1931 (1986) (federal law governs meaning of "deposit" in federal statute). Although we are not bound by any state court pronouncements regarding the breadth or scope of these terms, we do consult for guidance the body of New York law concerning the design and operation of the rent regulation programs at issue. We also, of course, continue to defer to state courts' pronouncements regarding the definition of property interests. See *Butner v. United States*, 440 U.S. 48, 55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979). However, as we fully explain below, were we to find that New York law creates "statutory" tenancies not ultimately based on a lease or other voluntary contractual arrangement, we would have to consider whether such a statutory grant of a property interest amounts to the taking of private property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. Regulated Tenancies

A tenancy is an interest in the exercise of dominion over property for a fixed or computable duration. Restatement (Second) of Property § 1.4 (1977). A tenancy is initiated by a voluntary contractual arrangement between the landlord and tenant, typically memorialized in a written and signed lease. See, e.g., N.Y. Gen. Oblig. Law § 5-703 (McKinney 1989) (tenancy for period exceeding one year must be evidenced by writing, signed by

party to be charged). In many states, however, it is possible to create a tenancy of short duration by oral lease agreement, without any written evidence of the terms. *Id.*; see also Restatement (Second) of Property § 2.1.

Only two terms are indispensable to the creation of a tenancy: the duration, or "term"; and the price, or "rent." In addition, lease terms typically impose other obligations on the landlord (such as the provision of various services, doormen, appliances, lighting of common areas, etc.) and on the tenant (such as maintaining the premises, avoiding excessive noise, timely reporting any needed repairs, etc.). The bundle of rights and duties will vary from tenancy to tenancy—the only common denominator being that every contract will specify rent and duration.

Although tenancy is premised on a voluntary contractual arrangement, certain obligations may be affected by operation of law. For example, regardless of any express terms to the contrary, virtually all states read a warranty of habitability into residential lease-contracts. See, e.g., N.Y. Real Prop. Law § 235-b (McKinney 1989); Restatement (Second) of Property § 5.1 (reporter's note listing states). Moreover, some states prohibit or refuse to enforce certain lease clauses. See, e.g., Conn. Gen. Stat. Ann. § 41a-4 (West 1993) (unenforceable clauses include confession of judgment and tenant's consent to distraint of personal property). While these laws change the obligations of nonconforming contracts, the voluntary and contractual nature of the relationship remains. All terms unaltered by law continue to be enforceable obligations, and each party is free to continue or discontinue the tenancy in accordance with the terms of the contract.

New York and the nine tenants contend that New York's tight net of regulation creates a statutory tenancy that is in effect non-contractual, and beyond the reach of RTC's repudiation power. We address below each of the three regulatory systems cited and relied upon by New

York and the rent-regulated tenants: (1) rent stabilization; (2) rent control; and (3) The Martin Act.

1. Rent Stabilization

New York's rent stabilization laws regulate the two terms at the core of the landlord-tenant relationship: rent and duration. The regulations govern the initial rent, N.Y.C. Admin.Code § 26-512b, 9 NYCRR § 2521, restrict rent increases, N.Y.C. Admin.Code § 26-512a, 9 NYCRR § 2522, mandate lease renewal, N.Y.C. Admin. Code § 26-511c(4), 9 NYCRR § 2522.5(b)(1), and, upon the tenant's vacating of the premises, allow the tenancy to pass statutorily to certain members of the tenant's household so long as that individual has lived with the tenant since the inception of the tenancy or, in the case of the death of the tenant, for at least the two years immediately preceding the tenant's demise. 9 NYCRR § 2523.5(b).

Landlord compliance with this scheme is enforced chiefly by limiting the grounds for eviction: "As long as the tenant continues to pay the rent . . . no tenant shall be denied a renewal lease or be removed from any housing accommodation" except on specified grounds. 9 NYCRR § 2524.1(a). Such grounds include the owner's desire to take possession for the owner's own use as a primary residence (§ 2524.4), and certain wrongful acts by the tenant (§ 2524.3). A landlord who fails to proffer a renewal lease will get no increase in rent until he comes into compliance with the Code. 9 NYCRR § 2522.5(b)(2). The incentive in this provision ensures that virtually all rent-stabilized tenancies will be governed by a written lease-contract.

Rent stabilization is therefore lease-based in the sense that it operates through the regulation of lease terms. The program contemplates and requires a written lease-contract as the basis of tenancy. See 9 NYCRR § 2520.12 ("The provisions of any lease or other rental agreement

shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with [the rent regulations] . . ."). While statutory provisions alter or restrict important terms of the contract, the tenancy retains much of the character of a voluntary contract. Rent-stabilized tenancy is dependent upon a lease in these ways, and therefore is subject to RTC's repudiation power under § 1821(e).

2. Rent Control

New York's rent control statute does not contemplate or require a current written lease of the premises. Even though the original tenancies were created by written lease-contracts years (often decades) earlier, the landlord under rent control is not required to proffer a renewal lease at expiration, and the rent-control tenant is not required to sign one. So long as the tenant pays the rent, the landlord may not evict: "No tenant, so long as he or she continues to pay the rent . . . shall be removed from any housing accommodation which is subject to rent control . . . notwithstanding the fact that the tenant has no lease or that his or her lease . . . has expired or otherwise terminated . . . ." N.Y.C. Admin.Code § 26-408a. The district court concluded therefore that the rent-controlled tenancy is something distinct from a property interest under a lease or contract. We disagree.

The rent-controlled tenancy bears many of the hallmarks of a contractual relationship. Indeed, it is difficult to see any other lawful basis for the landlord-tenant relationship. Under rent control, the landlord and tenant owe mutual obligations: the tenant is obligated to pay rent, and the landlord is obligated to provide a bundle of rights and services. The regulations provide that a landlord may not reduce the level of services that were provided to the tenant under the initial tenancy-creating contract. 9 NYCRR § 2201.2 ("Every landlord shall furnish with housing accommodations the same dwelling space and the same essential services, furniture, furnishings and equip-

ment as were furnished, or required to be furnished, on April 20, 1962 or any subsequent date determining the maximum rent."). The kind, level and schedule of services that the landlord owes the rent-control tenant is therefore determined by reference to the original lease-control creating the tenancy. See 9 NYCRR § 2200.13 ("The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with the Rent Law or these regulations."). Taken together, these two provisions enforce many of the original contractual elements of the tenancy. This being so, the landlord-tenant relationship is defined and governed by contract, rent control notwithstanding.

The courts of New York recognize that the terms of the last written lease continue to remain in effect under rent control. In *Barrow Realty Corp. v. Village Brewery Restaurant, Inc.*, 272 A.D. 262, 70 N.Y.S.2d 545, 546 (App.Div. 1947), New York's intermediate appellate court considered whether or not a provision of the original lease (providing that the tenant shall pay the landlord's attorney fees in a proceeding brought because of tenant's default) survived the lease expiration, and concluded that "the clause . . . is carried over, as are other provisions of the lease, to the tenant's occupancy during the period in which he remains in possession under the emergency rent law after the expiration of the term of the lease." The absence of any current written lease notwithstanding, the court held:

> Default in the payment of the emergency rent is not merely a statutory default; it is a default under the lease. . . . The continued occupancy permitted by the statute stems from the lease and the tenancy created thereby, and the emergency rent is fixed on the basis of the rental established in the lease. With the terms of the lease otherwise remaining in force, it may not fairly be said that the rent payable during

> the emergency period is merely a statutory rent and is not under the lease.

Id., see also *Hudson View Properties v. Weiss*, 109 Misc. 2d 589, 442 N.Y.S.2d 367, 370 (App.Term 1981) ("In the case of a statutory tenancy . . . 'with the exceptions of the duration of the term, and the amount of rent payable, the rule established by the weight of authority is that insofar as the provisions of a lease which has expired are not in conflict with the then prevailing emergency rent statutes, and are not confined to the period of the expired lease, they are projected into the statutory tenancy, and will continue in effect during the term of the statutory tenancy.'" (quoting Rasch, New York Landlord and Tenant, 2d Ed., § 286)), rev'd, 86 A.D.2d 803, 448 N.Y.S.2d 649 (App.Div. 1982), rev'd, 59 N.Y.2d 733, 463 N.Y.S.2d 428, 450 N.E.2d 234 (1983); *130 West 57 Corp. v. Hyman*, 188 Misc. 92, 66 N.Y.S.2d 332, 334 (App.Term 1946) ("The housing emergency calls for such stringent measures but it would be carrying the protection afforded a tenant to an unfair degree to hold that the obligations of the tenancy incorporated in the lease do not govern the relationship of landlord and tenant. . . . The rights and obligations of the parties under the lease are projected into and become part of the statutory tenancy, except where they are plainly inconsistent with the Act.").[2]

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[2] See also *65 Central Park West, Inc. v. Greenwald*, 127 Misc. 2d 547, 486 N.Y.S.2d 668, 672 (N.Y. City Civ.Ct. 1985) ("The fact that the original lease has expired is irrelevant because the terms and conditions of that lease are said to continue in the context of the rent controlled statutory tenancy." (citation omitted)); *Stephen Estate, Inc. v. Kaplan*, 198 Misc. 948, 100 N.Y.S.2d 455, 460-61 (N.Y. City Mun.Ct. 1950) ("The conventional relationships of landlord and tenant, with privity of contract and privity of estate, existed . . . prior to the expriation of the lease. That under the Emergency Housing Laws, the provisions of a lease, except for the term and the rent reserved are projected into and become a part of the statutory tenancy is now beyond question." (citations omitted)).

Rent control, like rent stabilization, affects the lease by statutorily altering and specifying certain terms, chiefly by granting the tenant a statutory renewal option. That option to renew is exercised, at least tacitly, when the tenant continues in occupancy after receiving notice of the biennial rent adjustment made pursuant to the statute and regulations, N.Y.C. Admin.Code § 26-405a(4), 9 NYCRR § 2201.5, thereby agreeing to pay the new rent during the next two years. But rent control does not obliterate the lease.

Even were we to agree with New York that a rent-controlled tenancy is independent of any lease (which we do not), we would still hold that it is sufficiently rooted in contract to fall within the express language of FIRREA. While these tenancies are tightly regulated and policed, such a regime does not eliminate the contractual nature of the relationship, any more than do the regulatory schemes governing the provision of such services as electric power, natural gas, medallion taxi rides, or cable television. Some contracts are more heavily regulated than others, but they are not thereby transformed into something non-contractual or super-contractual.

The voluntary and contractual aspects of the rent-control arrangement distinguish it from the kind of housing measure invalidated by the New York Court of Appeals as an unconstitutional taking in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, cert. denied, 493 U.S. 976, 107 L. Ed. 2d 503, 110 S. Ct. 500 (1989). There, the Court of Appeals struck down a local ordinance requiring owners of properties used as single-room occupancy housing ("SRO's") to rehabilitate their buildings for use as SROs indefinitely, and contrasted that ordinance with rent regulations such as those at issue in this case: "the rent-control and other landlord-tenant regulations that have been upheld . . . merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put

their properties to use for residential housing." 544 N.Y.S. 2d at 548. The SRO ordinance was found to be a per se taking because its coercive design eliminated the voluntary and contractual nature of the landlord-tenant relationship, and " 'interferes so drastically' . . . with the SRO property owners' fundamental rights to possess and to exclude." 544 N.Y.S.2d at 548 (quoting *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 836, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), and citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982)).

We conclude, therefore, that New York's statutory tenancies—whether under rent stabilization or rent control —are contract-based leaseholds. That being the case, they fall within the express language of § 1821(e), and are subject to RTC's statutory power to repudiate. By repudiating the contract or lease creating the tenancy, RTC is effectively dissolving the tenancy. Once it has done so, no statutory or regulatory provision—at least none that can pass constitutional muster—can revive that tenancy.

3. The Martin Act

The Martin Act, New York's blue sky law, alters our analysis not at all. "No private action has been expressly authorized" in the Martin Act. *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 807, 514 N.E.2d 116 (1987). "The specific purpose of the statute was to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices. . . ." *Id.* Most enforcement of the Martin Act is in the hands of the Attorney General, usually by means of a fraud action.

The Martin Act requires the offeror to reassure tenants in the offering documents that their rights under rent regulation will survive if they do not buy their apartments.

The Act does not add to those rights in any way, however. The Attorney General enforces the offeror's obligation by his power to control the sale of securities. Thus the Martin Act forbids the sale of the cooperative or condominium shares unless the offering documents have been certified for filing by the Attorney General (and filed), and prohibits the Attorney General from certifying the offering documents for filing unless they contain the requisite disclosures and assurances. N.Y. Gen. Bus. Law § 352-eeee2.

The Martin Act thus does no more than require that certain statements be included in the offering documents. It creates no private affirmative right and no private right of action. *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Associates*, 191 A.D.2d 621, 595 N.Y.S.2d 492, 494 (App.Div. 1993) ("It is now well settled that there is no private cause of action under the Martin Act.") (citing *CPC Int'l v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 514 N.E.2d 116 (1987); *Vermeer Owners v. Guterman*, 78 N.Y.2d 1114, 578 N.Y.S.2d 128, 585 N.E.2d 377 (1991); *Board of Managers of Fairways at North Hills Condominium v. Fairways at North Hills*, 150 A.D.2d 32, 545 N.Y.S.2d 343 (App. Div. 1989)). Non-purchasing tenants of a condominium subject to a Martin Act conversion plan hold their tenancies by contract (however that contract may have been shaped and extended by legislation), and these tenancies are therefore subject to repudiation by the RTC.

C. Congressional Intent

If it chooses, Congress can grant disaffirmation or repudiation power in a way that preserves state regulated leases and contracts. For example, under the Bankruptcy Code a trustee in bankruptcy is granted power to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). In *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986), the court held that a debtor-lessor could not use that provision to

repudiate leases that were subject to New York's rent control laws. New York's brief on the present appeal, and the opinion of the district court, rely heavily on Friarton. However, as Bankruptcy Judge Prudence Abram noted in *Friarton*, the Bankruptcy Code includes an express provision allowing the tenant to effect "any renewal or extension of such term that is enforceable by such lessee under applicable nonbankruptcy law." 65 B.R. at 593 (quoting 11 U.S.C. § 365(h)(1)). *Friarton* bars the debtor from exercising the power to repudiate leases that are rent-controlled or rent-stabilized, because the tenant's right to renew and extend the tenancy is conferred by "applicable nonbankruptcy law."

The express deference to "applicable nonbankruptcy law" in the Bankruptcy Code which saves from repudiation lease renewal rights enforceable under rent control, has no counterpart in FIRREA or FDIA. The bankruptcy provision has been in the Code since its inception in 1978. Pub.L. No. 95-598, 92 Stat. 2574 (1978). When Congress enacted FIRREA in 1989, Congress borrowed and adopted many of the provisions of the Bankruptcy Code dealing with a lessee's rights when the debtor-lessor rejects a lease contract. See S.Rep. No. 19 at 314 (12 U.S.C. § 1821(e) was "closely modeled on parallel provisions of section 365 of the Bankruptcy Code."). It is telling that the only relevant feature that Congress omitted from 12 U.S.C. § 1821(e)(5) was the one that grants the lessee a right to exercise his renewal or extension options under "applicable nonbankruptcy law."[3]

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[3] Compare 11 U.S.C. § 365(h)(1) ("If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor . . . the lessee . . . may treat such . . . as terminated by such rejection . . . or, in the alternative, the lessee . . . may remain in possession of the leasehold . . . for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee . . . under applicable nonbankruptcy law.") with 12 U.S.C. § 1821(e)(5)(A) ("If the conservator or receiver repudiates an unexpired written lease of real property . . . the lessee under such lease may either—(i) treat the lease as

This alone strongly signifies Congressional intent to grant RTC greater powers in this respect than those given to a bankrupt debtor. See *Wheeler v. Greene*, 280 U.S. 49, 51, 74 L. Ed. 160, 50 S. Ct. 21 (1929) "When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed.").

The textual distinction between FIRREA/FDIA and the Bankruptcy Code is reinforced by functional considerations. Without the deference to "applicable nonbankruptcy law" in the Code, prospective bankrupts could achieve solvency by acquiring rent-regulated properties before filing under Chapter 11 so that the rent-regulated leases could be alchemized by repudiation. Thus the Code's bar on the repudiation of rent-regulated leases prevents the use of the bankruptcy process as a device for emptying rent-controlled properties.

These same concerns do not arise in the FIRREA context. RTC does not acquire properties for speculation and is not actively seeking to acquire rent-regulated properties in order to repudiate leases. Under its statutory mandate, RTC simply disposes of properties that come into its hands from failed financial institutions. Absent any likelihood of predatory behavior by RTC as receiver or conservator, there was no reason for Congress to restrict the kinds of tenancies subject to its repudiation powers, and every reason for Congress to strengthen RTC's hand in remedying a national economic emergency.

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terminated by such repudiation; or (ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.").

D. Post-Repudiation Occupancy Rights

Once RTC repudiates a lease, a tenant may choose to "remain in possession of the leasehold interest for the balance of the term of the lease . . . ." 12 U.S.C. § 1821 (e)(5)(A)(ii). New York and the tenants argue that, even if a statutory tenancy is a leasehold, New York law makes the leasehold perpetual, and that RTC therefore is not entitled to evict them even if RTC has power to repudiate the leases. If the leasehold were truly perpetual, this argument would mandate affirmance of the result reached by the district court.

How long is "the balance of the term of the lease" when the RTC repudiates a rent-regulated New York tenancy? Since tenancies under the rent stabilization law are expressly lease-based, § 1821(e)(5)(A)(ii) allows the tenant to continue the tenancy on existing terms until the end of the lease term during which the notice of repudiation is given.

Rent-controlled tenancies, however, do not run for any specified term. There are two conceivable arguments for the idea that the term is perpetual: first, by analogy to perpetual written leases under New York law; second, by reference to the potentially lifelong and inheritable nature of rent-controlled occupancy.

Under New York law, a perpetual lease can be created by the grant of a fee interest in property coupled with the grantor's reservation of a right to collect rent forever. See *First Religious Society in Whitestown v. Socony Mobil Oil Co.*, 44 Misc. 2d 415, 253 N.Y.S.2d 839, 842 (Sup. Ct. 1964) (grant of fee interest in property, where grantor reserves right to collect rent in perpetuity, landlord-tenant relationship under a perpetual lease). Such an arrangement, however, is disfavored by the law and can come into being only if the lease itself clearly provides for perpetual tenancy. See *Garner v. Gerrish*, 63 N.Y.2d 575, 483 N.Y.2d 973, 975, 473 N.E.2d 223 (1984). In the absence of an express lease duration or an

express term of perpetuity, New York law assigns a lease term, usually a short one. See N.Y. Real Prop. Law § 232 (McKinney 1989) (where parties fail to specify, lease of New York City property ends October 1, following possession); see also Restatement (Second) of Property § 1.5, and Comment (d) to that section ("Where the parties enter into a lease of no stated duration and periodic rent is reserved or paid, a periodic tenancy is presumed. The period thus presumed is equal to the interval for which rent is reserved or paid to a maximum periodic tenancy of year to year."); N.Y. Real Prop. Law §§ 232-a (notice to terminate month to month tenancy in New York City), 232-c (holding over tenant after expiration of term; effect of landlord's acceptance of rent); *28 Mott Street Co. v. Summit Import Co.*, 34 A.D.2d 144, 310 N.Y.S.2d 93 (App. Div. 1970) (occupancy of premises for six years, bimonthly payments and unexecuted ten year lease, together created year to year tenancy), aff'd, 28 N.Y.2d 508, 319 N.Y.S.2d 65, 267 N.E.2d 880 (1971).

New York contends that a rent-controlled lease term ends when the right of occupancy ends, which would allow a repudiated lease to run under § 1821(e)(5)(A)(ii) for the lives of the tenant, the tenant's spouse or life companion, and of their issue. However, the power of repudiation under section 1821(e) was conferred in aid of an acute financial emergency, and cannot be construed fairly to accommodate so prolonged a residual tenancy. In any event, we cannot use these statutory occupancy rights to delimit the leasehold for FIRREA purposes because the statutory tenancy is by definition limited to the life of the statute, and therefore cannot outlive the declared end of the wartime housing emergency that the statute purports to remediate. Moreover, the temporary nature of the rent control laws is needed to insulate them from constitutional challenge. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 73 L.Ed. 2d 868, 102 S. Ct. 3164 (1982) ("This Court has consistently affirmed that States have broad power to regulate

. . . the landlord-tenant relationship . . . . In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party." (citations omitted)); *Block v. Hirsh*, 256 U.S. 135, 157, 65 L. Ed. 2d 865, 41 S. Ct. 458 (1921) ("A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").

Rent-controlled tenancy under New York law is therefore neither perpetual nor measured by the life of the tenant (and the tenant's successors). New York law provides two intervals that can be used to fix the term of a rent-controlled tenancy. Under N.Y. Real Prop. Law § 232, a lease agreement for real property in New York City that fails to specify a duration is deemed to end on the October 1 next following the date that the tenant occupies the premises. That rule, however, is evidently designed to supply a missing term in an unregulated contract. Since a specific body of New York law regulates rent-controlled tenancies, and since that body of law extended the tenancy, we first consider whether that body of law divides the tenancy into periods analogous to lease terms. Since it does, we look no further. Under rent control the lease term ends, for purposes of § 1821(e), on the biennial January 1 date on which the landlord next becomes entitled (following the notice of repudiation) to a review of the maximum base rent. See N.Y.C. Admin. Code § 26-405a(4)). Therefore, the term of a rent controlled tenancy is two years, commencing on the January 1 of the last biennial review set by the statute prior to notice of repudiation.

E. Other Arguments

New York argues that, even if RTC has the power to repudiate these tenancies, RTC has violated its statutory mandate in repudiating the nine tenancies at issue on this appeal. First, New York contends that there was no proper basis for RTC's determination that these leases

are "burdensome". RTC, as conservator or receiver, may repudiate contracts or leases "the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome." 12 U.S.C. § 1821(e)(1)(B). New York contends that "burdensomeness" must be evaluated in terms of RTC's statutory mandate to "maximize the net present value return" on asset disposition. Underlining the word "present," New York argues that "Congress instructed RTC to focus" on the asset's "current value, not its value at some future date," and that the "current value" of the nine condominium apartments is their value under rent control and rent stabilization.

We are unpersuaded. The "current" value of any rented property is of course affected by a leasehold interest; but that happens regardless of whether the leasehold is "statutory." The point is that Congress has expressly conferred a power of repudiation that allows RTC to realize "current" value of property free of such leaseholds. Moreover, Congress instructed RTC to exercise its discretion in determining which contracts or leases are burdensome, pursuant to an overarching mandate to "maximize the net present value return" on assets in its possession. It is uncontroverted that (a) these tenancies are causing RTC to lose close to $19,000 per month and (b) these occupied rent-regulated units are worth millions of dollars less than they are worth vacant or free of rent regulations. It cannot be said therefore that RTC abused its discretion in finding these tenancies burdensome.

Next, New York argues that "if FTC prevails in this case, it will be empowered to proceed to repudiate [other] statutory tenancies" and that this "will have a farreaching effect" on New York's housing market. This, according to New York, violates FTC's obligation to consider the adverse impact of its actions on local communities" inasmuch as "thousands of long-term tenants [will be] suddenly evicted from their homes."

New York points to RTC's obligation to minimize the impact of its asset dispositions on "local real estate and financial markets." 12 U.S.C. § 1441a(b)(3)(C)(ii). As to these nine tenancies—the only ones at issue at this time—even the simultaneous sale of all nine would have no more than a de minimis effect on the market. As to all others, we simply lack sufficient information to tell.[4] For example, we do not know how many of these units have below-market rents, how many might be occupied by tenants whose income renders the tenancy ineligible for repudiation under RTC's Statement of Policy, how many tenancies RTC will exercise its statutory discretion to repudiate, which ones out of that number will be purchased by the current tenants, over what time the remaining units would come on the market, whether RTC would spread unit sales over time to advance its own interest in maintaining a firm market, and how RTC might otherwise exercise its discretion (conferred by Congress) to avoid adversely impacting the market. Until RTC exercises its discretion to actually repudiate an appreciable number of additional tenancies, a court is not in a position to consider whether or not RTC's conduct falls within the rather nebulous statutory parameters, or even who (if anyone) would have standing to raise the issue.[5]

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[4] According to RTC, however, it currently holds approximately 274 rent-regulated cooperative or condominium units, which represents approximately .015% of the 1,884,000 residential rental units in New York City. Accepting arguendo New York's contention that this number could be closer to 1,000, this would still only amount to .053% of the rental market.

[5] New York expresses concern for the "far reaching effects on the tenants." However, any impact on tenants will be mitigated by RTC's express policy not to exercise its repudiation power with respect to families of low and moderate income. Under the current Statement of Policy (and pursuant to 12 U.S.C. § 1441a(b)(3)(C)(v)), the only rent-regulated tenants who would be exposed to possible repudiation of their tenancies are those with income (according to the figure proffered by New York at oral argument) in excess of $45,000 per year.

Finally, New York urges that any repudiation of these "statutory" tenancies will constitute a taking without just compensation in violation of the Fifth Amendment to the Constitution. This argument fails for at least two reasons. First, New York assumes there is a property interest here warranting compensation if "taken." However, any property interest in a temporary estate, by definition, can extend only to the end of the term of that estate. We have already decided that each tenant has the option of remaining in possession through the end of the tenancy's term: so nothing is being "taken." Second, New York in its brief identifies the thing taken as "leasehold interests." But § 1821(e) expressly authorizes the repudiation of leases, and in several places refers to the repudiation of a tenant's "leasehold interest." See 12 U.S.C. §§ 1821(e)(5)(A)(ii) and (B). The state's regulatory overlay certainly makes these tenancies more advantageous, but that simply reinforces RTC's finding that they are burdensome.

F. Conflict Preemption

Having held that § 1821(e) expressly authorizes RTC to repudiate the tenancies at isuse, we have no occasion to reach or address "conflict" preemption, a provocative issue thoroughly considered by the district court. 801 F. Supp. at 1162-64. We note, however, that the Resolution Trust Corporation Completion Act, Pub.L. No. 103-204, 107 Stat. 2369 (1993), signed into law three days before the oral argument of this appeal, contains the following provision under the heading "RTC Management Reforms" (and the subheading "contracting procedures"): "nothing in this Act, or any other provision of law, shall supersede the [RTC's] primary duty of minimizing costs to the taxpaye. and maximizing the total return to the Government." 12 U.S.C. § 1441a(w)(19)(B). Inasmuch as the affirmation or disaffirmation of a contract is arguably a "contracting procedure," this could be read to accomplish the preemption of state rent regulations, to the extent they interfere with RTC's mandate. We are not required to reach this issue, however.

G. Ribner's Claim to Tenancy

Lloyd Ribner alleges that he holds his tenancy by succession from his mother, Muriel Ribner. For this succession to be valid under New York's rent regulations, he must have resided in his mother's apartment at least for two years immediately prior to her death. 9 NYCRR § 2204.6(d)(1). In support of its motion for summary judgment, RTC presented evidence that Ribner had moved into the apartment only several weeks before his mother's death, and that within several days of her demise he had once again vacated the premises. Ribner provided rebuttal evidence in the form of an affidavit stating that he "resided with her contemporaneously for several years prior to her death . . . ." On this basis, the District Court found there to be a disputed material fact in issue, and denied both parties' motions for summary judgment.

When a moving party has supported his motion with an affidavit, Rule 56(e), Fed.R.Civ.P. requires that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." We cannot say that Ribner failed to satisfy this requirement. That depends on whether, given the artful phrasing of his affidavit, his having "resided with [his mother] contemporaneously" means (as it is calculated to suggest) that he resided with her continuously for the period of "several years"; that "several" means two or more; and that "prior" means immediately prior. Nothing less or different would satisfy the minimum statutory requirement. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (to successfully oppose motion for summary judgment, non-moving party must demonstrate more than "some metaphysical doubt as to the material facts, . . . [it] must come forward with 'specific facts showing that there is a genuine issue for trial.' ") (quoting Fed. R. Civ. P. 56 (e)). Notwithstanding these possible ambiguities, we conclude that the district court correctly denied both parties' motions for summary judgment on this issue.

The district court also dismissed the complaint against Ribner, because it could find "no indication that [thirty days' notice of intent to regain possession, required by New York rent control law] was ever served upon Ribner." 801 F. Supp. at 1164. This conclusion is wholly inconsistent with Ribner's admission (through his incorporation by reference of portions of the affidavit filed by another tenant) that he received a letter on August 17, 1990 indicating RTC's intent to repudiate the tenancy. That letter was received a full six months prior to the filing of RTC's complaint, and thus fully satisfies any thirty-day notification requirement. We therefore vacate the District Court's dismissal of RTC's complaint.

CONCLUSION

Title 12 U.S.C. § 1821(e) expressly authorizes RTC to "disaffirm or repudiate" tenancies subject to New York's rent stabilization and rent control laws—these tenancies being based in contract or lease. We therefore reverse the District Court's order, and direct it to enter summary judgment for RTC on the issue of RTC's power to repudiate these tenancies. As to defendant-appellee Lloyd Ribner, we affirm the district court's refusal to grant summary judgment, and vacate the district court's order dismissing the complaint. We also remand for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

Nos. 91 Civ. 1361 (RLC), 91 Civ. 1683 (RLC)

RESOLUTION TRUST CORPORATION, as receiver of Nassau Savings and Loan Association, F.A.,
Plaintiff,

v.

SELMA DIAMOND, IRA KAUFMAN, JEROME LEDERER, PEGGY LEHMAN, SUSAN SOLOMON PATTULLO, LLOYD RIBNER, as executor of the estate of Muriel Ribner, deceased, HORACE SOLOMON, LILLIAN SOLOMON, DENISE TUCKER ANGELO APONTE, Commissioner of the Division of Housing and Community Renewal of the State of New York, and ROBERT ABRAMS, Attorney General of the State of New York,
Defendants.

ROBERT ABRAMS, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Plaintiffs,

v.

RESOLUTION TRUST CORPORATION, NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., JEROME MARON, and ANTHONY T.S. CONRAD,
Defendants.

Aug. 21, 1992

ROBERT L. CARTER, District Judge.

At issue in these consolidated actions is whether the Resolution Trust Corporation ("RTC") is empowered by federal statute to evict tenants in RTC-controlled apartments in violation of state rent control, rent stabilization, and securities laws. The RTC contends that its enabling statute contains such authorization, and that contrary state laws are preempted under the Supremacy Clause of the United States Constitution. The Attorney General of the State of New York and the New York State Division of Housing and Community Renewal ("DHCR") (collectively the "State") argue that the RTC has no such power, and that state laws regulating rent and evictions are not preempted and must be obeyed by the RTC. Both the RTC and the State have moved separately for summary judgment.

The first of the consolidated cases is a declaratory judgment action, No. 91 Civ. 1361 (RLC), brought by the RTC as receiver of Nassau Savings and Loan Association, F.A. ("Nassau Savings"), against Angelo Aponte, the Commissioner of DHCR; Robert Abrams, the Attorney General of the State of New York; and the individual lessees of nine condominium units located at 444 East 57th Street, New York, New York (the "East 57th Street units") that the RTC acquired as a result of the failure of Nassau Federal Savings and Loan Association ("Nassau Federal"). The RTC has sought to evict rent-regulated tenants in the East 57th Street units and has adopted a policy statement which sets out its intention to take similar action against rent-regulated tenants in all other cooperative and condominium units under its control.[1]

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[1] The RTC adopted a "Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulation" (the "policy statement") in February, 1991. The policy statement declares, in relevant part:

> 1. The policy of the RTC will be to exercise its disaffirmaance or repudiation powers with regards [*sic*] to these units

In this action the RTC, which was established by Congress for the purposes of managing and disposing of the assets of failed savings and loan institutions, seeks to establish that it has the right under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183; 12 U.S.C. § 1441a(b), to disaffirm and repudiate condominium and cooperative unit leases; that this authority under FIRREA preempts any state law or regulation to the contrary; and that the RTC may therefore sell the East 57th Street units pursuant only to FIRREA provisions and without restraint of any law or regulation of New York State or New York City.

In the second of the consolidated actions, No. 91 Civ. 1683 (RLC), the State challenges the RTC's authority

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when it determines that: 1) the insured depository intention is a party to the lease; 2) the performance of which the conservator or receiver determines, in its discretion, to be burdensome; and 3) . . . the disaffirmance or repudiation of which the conservator or receiver determines, in its discretion, will promote the orderly administration of the institution's affairs.

2. Where the RTC finds that units are leased by low or moderate income tenants, the RTC will not exercise its disaffirmance or repudiation powers with respect to those units. For this purpose, a low or moderate income tenant is defined as a family or individual whose income does not exceed one hundred and fifteen percent (115%) of the median income in the area involved. . . .

3. Where the RTC determines to disaffirm or repudiate the leases of such units, the RTC may, in its discretion, offer the units for sale to the existing tenants or negotiate other arrangements, on terms which the RTC finds acceptable, in accordance with its mandate to maximize recoveries on the assets of the institutions in its control. If the existing tenants decline or fail to purchase the units or to enter into any other agreement acceptable to the RTC, the RTC will be free to consummate the disaffirmance or repudiation and to take whatever action it deems appropriate for the disposition of the units.

Complaint, No. 91, Civ. 1361 (RLC), Exhibit D.

to disregard New York State's comprehensive statutory scheme regulating the offer and sale of cooperative and condominium apartments and the rights of rental tenants. The State seeks declaratory and injunctive relief enjoining the RTC from taking any action in violation of the state rent and securities laws.

I.

The RTC finds its power to repudiate the leases of tenants of rent-regulated housing in 12 U.S.C. § 1821(e)(1), a part of FIRREA, which reads as follows:

> (e) Provisions relating to contracts entered into before appointment of conservator or receiver.
>
> (1) Authority to repudiate contracts.
>
> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may *disaffirm or repudiate any contract or lease*—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1) (emphasis added). The RTC argues that state rent and securities laws that regulate allowable rents and provide tenants with protection from eviction frustrate the accomplishment of the RTC's mandate under FIRREA to maximize the net present value of the assets of failed thrift institutions. The RTC therefore asserts that it may, pursuant to its discretionary powers under section 1821(e)(1), repudiate and disaffirm

the leases of tenants in rent-regulated housing under its control in New York State, and thereby exercise control over the apartments free from the constraints of the state rent and securities laws.

The State responds that FIRREA does not give the RTC the power to disregard the requirements of state rent and securities laws. The State argues that the occupancy rights of tenants in New York's rent-regulated housing do not stem from leases or contracts, but instead from statutory tenancies created by the state rent control and rent stabilization laws. The State contends that section 1821(e)(1) gives the RTC power to repudiate or disaffirm contracts and leases but not statutory tenancies, and that the RTC therefore does not have the power to evict the East 57th Street tenants, or any other tenants of rent-regulated housing under RTC control in New York State.

The RTC replies to the State's argument by asserting that FIRREA has preempted whatever rights tenants in rent-regulated housing may have under New York statutory law, thereby leaving only a lease relationship between the tenants and the RTC as landlord. The RTC would then be free to repudiate the leases under section 1821 (e)(1). The issue of whether the state rent and securities laws are preempted by FIRREA is complicated, however, and will require extensive discussion.

Under the Supremacy Clause of the United States Constitution, laws passed by Congress become the law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. IV, Cl. 2. However, "[p]reemption of state law by federal statute is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S.

132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)). This presumption against preemption applies especially where the state law said to be preempted is within the traditional police powers of the states. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978); *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991). In such cases, the party arguing for preemption carries a heavy burden of showing that preemption was the "clear and manifest purpose of Congress." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com.*, 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983); *see also General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir.1990) ("compelling evidence" of an intent to preempt must be shown where the area is traditionally regulated by the states).

The state laws that the RTC claims are preempted by FIRREA deal with rent and real estate securities regulation, which are areas within the traditional police powers of the states. *See Rowe v. Pierce*, 622 F.Supp. 1030, 1033 (D.D.C.1985). Accordingly, there is a presumption against preemption of the state laws by FIRREA.[2]

[2] The RTC argues that the presumption against preemption only arises where the *federal* legislation regulates areas traditionally within the police powers of the states, not where the state laws allegedly preempted do so. The RTC asserts that FIRREA, as a federal banking statute designed to solve a crisis among savings and loan institutions, is not a federal statute that involves the traditional police powers of the states, and that therefore no presumption against preemption should apply here.

This argument misses the mark. First, the cases make clear that a presumption against preemption arises not only when federal legislation involves areas historically reserved to the states, but also when the state statutes sought to be preempted do as well. *See Rogers, supra*, 948 F.2d at 859; *Medical Soc. of State of New York v. Cuomo*, 777 F.Supp. 1157, 1160-61 (S.D.N.Y.1991) (Haight, J.).

Second, the rationale behind having such a presumption in the first place applies whether the federal or the state laws involve the traditional police powers of the states. The doctrine is designed

Federal statutes can preempt state laws in three ways: expressly, through implication, or where there is a conflict between the state and federal laws. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987). Express preemption is found where the federal legislation contains an express statement of a clear and manifest intent to preempt state laws. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Implied preemption occurs where there is a clear indication that Congress intended to occupy the entire regulatory field. *Guerra, supra*, 479 U.S. at 280-81, 107 S.Ct. at 689. The third type of federal displacement of state law, "conflict preemption," occurs either where there is a conflict between the federal and state laws which makes compliance with both laws physically impossible, or where there is a conflict in which application of the state law will create an obstacle to the accomplishment of the full objectives of Congress. *California v. ARC America Corp.*, 490 U.S. 93, 100-101, 109 S.Ct. 1661, 1664-1665, 104 L.Ed.2d 86 (1989); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Medical Soc. of State of New York v. Cuomo*, 777 F.Supp. 1157, 1161 (S.D.N.Y.1991) (Haight, J.). The RTC contends that the state rent and securities laws are preempted on the basis of express provisions of

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to ensure that the traditonial police powers of the states not be lightly superseded by federal laws. *See California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Given this rationale, it matters little whether the federal legislation addresses areas of traditional state concern directly, or whether the state laws that the federal legislation is claimed to preempt address such state police powers. In either case, concern for protecting against unintentional federal displacement of state laws justifies a presumption against preemption by federal law.

FIRREA and because of a conflict between the state laws and FIRREA.

II. *Express Preemption*

The RTC argues first that FIRREA expressly preempts the state rent and securities regulations. The RTC relies on 12 U.S.C. § 1821(c)(2)(C), which reads: "When acting as conservator or receiver . . . the [RTC] shall not be subject to the direction or supervision of any . . . State in the exercise of the [RTC]'s rights, powers and privileges." The RTC asserts that the state rent and securities laws subject the RTC to the direction of the state in the exercise of the RTC's rights, powers and privileges, and that the state provisions are therefore expressly preempted by section 1821(c)(2)(C). However, the State challenges the RTC's apparent assumption that its "rights, powers and privileges" include the power to repudiate a statutory tenancy. If, as the State argues, the tenants in the East 57th Street units occupy their apartments by virtue of statutory tenancies rather than leases, and if the RTC does not have the power under section 1821(e)(1) to repudiate such statutory tenancies, then the RTC's "rights, powers and privileges" do not include the power to repudiate the tenancies, and there can be no express premption under section 1821(c)(2)C).

Accordingly, determination of whether the state rent and securities laws are expressly preempted by FIRREA requires the court to address two separate questions: 1) whether the tenants in this case have occupancy rights by virtue of leases or instead pursuant to statutory tenancies independent of any leases; and, 2) if these rights derive from statutory tenancies, whether the "any contract or lease" language of section 1821(e)(1) empowers the RTC to repudiate statutory tenancies as well as the more traditional landlord-tenant relationship embodied in a lease.

A. *Occupancy Rights of Rent-Regulated or Non-Purchasing Cooperative and Condominium Tenants*

The State claims that the East 57th Street tenants, and others in their situation, are in continued possession of their apartments not by virtue of any leases entered into between themselves and their landlords, but because of statutory tenancies created by at least one of three statutes: New York's rent control law, its rent stabilization law, or a section of its general business law commonly referred to as the "Martin Act."

New York law provides two systems of protection for certain rental properties: rent control and rent stabilization. Both systems regulate allowable rents and protect tenants from eviction except under specified circumstances. Section 26-408 of New York's rent control law provides:

> No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this chapter by action to evict or recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithtsanding any contract, lease, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto, . . .

except on certain specified grounds, e.g. that the tenant is violating a substantial obligation of the tenancy, or where the landlord has obtained a certificate of eviction from the supervising government agency. N.Y. City Admin.Code § 26-408 a, *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987). The language of the statute itself makes clear that the tenants it covers

enjoy a protection from eviction that is independent of any lease that may exist between landlord and tenant.

New York case law supports this interpretation. As the court noted in *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr.S.D.N.Y.1986), "[u]nder New York law, the occupancy of a statutory tenant is 'not under any agreement, express or implied, but by virtue of the compulsion exerted on the landlord by the local emergency rent laws which allowed him to remain in possession.'" *Id.* at 592 (quoting *Whitmarsh v. Farnell,* 298 N.Y. 336, 343, 83 N.E.2d 543 (1949). Similarly, when called upon to determine whether rent-controlled tenants held their apartments by lease or by statutory tenancy, the court in *W.T. Associates v. Huston,* 123 Misc.2d 24, 26, 472 N.Y.S.2d 562, 564 (Sup.Ct.N.Y.Cty.1984), held that rent controlled tenants "are statutory tenants . . . [who] do not hold leases. . . ." Thus, the tenants in the East 57th Street units, as well as all other tenants in rent-controlled housing now under the control of the RTC, enjoy occupancy rights under New York law that are independent of any lease or contractual relationship with their landlords.

New York's rent stabilization laws are structured somewhat differently, but the result is the same. The rent stabilization law requires owners to grant a renewal lease of one or two years to all rent-stabilized tenants. *See* N.Y. City Admin.Code § 26-511, *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987); N.Y. Comp. Codes R. & Regs. tit. 9, part 2522.5 (1990). However, while rent-stabilized tenants, unlike rent-controlled tenants, do hold leases, they also enjoy statutory rights that are independent of any lease. If a landlord refuses to offer a tenant a renewal lease, the tenant has the right under statutory law to remain in possession and continue paying the previously authorized rent. The leases merely provide a means for periodically increasing the rents landlords are allowed to charge. *See Park Summit Realty Corp. v. Frank,* 107 Misc.2d 318, 323, 434 N.Y.S.2d 73, 76-77 (App. T. 1st Dep't 1980), *aff'd,* 84 A.D.2d 700, 448

N.Y.S.2d 414 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 1025, 453 N.Y.S.2d 643, 439 N.E.2d 358 (1982) (applying *Whitmarsh v. Farnell, supra*, 298 N.Y. at 343, 83 N.E.2d 543, reasoning to rent stabilization as well as rent control context); Affidavit of Angelo Aponte, Commissioner of DHCR, Jan. 9, 1992, ¶¶ 12-16. Accordingly, even if RTC repudiated the leases of rent-stabilized tenants in the condominium or cooperative units it controls, those tenants would still enjoy statutory rights to remain in possession of their apartments indefinitely and without a rent increase. Aponte Affidavit, ¶ 14.

The third law that the State contends gives a statutory tenancy to the tenants at the East 57th Street units, as well as to other non-purchasing tenants in cooperative and condominium units controlled by the RTC, is the Martin Act, N.Y. Gen. Bus. Law, §§ 352 *et seq.* (McKinney 1984). The Martin Act governs the offer and sale of securities, commodities, cooperative apartments and condominiums, and regulates the conversion of residential apartment units to cooperative or condominium ownership. The 45-unit building at 444 East 57th Street was converted to condominium ownership under sections 352-e and 352-eeee of the Martin Act between 1981 and 1983. The conversion was accomplished under a non-eviction plan, which provides certain protections for tenants who decide not to purchase their units at the below-market "insider's" price the conversion guarantees them, but instead to continue to rent the apartments as before.

Section 352-eeee(2)(c)(ii) sets forth permissible reasons for which a non-purchasing tenant may be evicted from the apartment, such as non-payment of rent, illegal use of the apartment, or refusal of access to the owner, but otherwise provides that "[n]o eviction proceedings will be commenced at any time against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy." *Id.* Accordingly, tenants protected by the Martin Act may only be evicted for one of the reasons enumerated in section 352-eeee(2)

(c)(ii), not because their lease has expired or been extinguished. This provision of the Martin Act therefore grants non-purchasing tenants of converted cooperative or condominium apartments occupancy rights separate from any lease agreement they may have with the owners of their apartments. Further, this section specifically provides that "an owner of a unit or of the shares allocated thereto may not commence an action to recover possession of a dwelling unit from a non-purchasing tenant on the grounds that he seeks the dwelling unit for the use and occupancy of himself or his family." *Id.* It is clear, therefore, that the statutory scheme grants indefinite rights of occupancy to the non-purchasing tenants, and that the purchaser of an occupied apartment is on notice of his potentially long-term inability to occupy the apartment himself. These statutory occupancy rights are separate from and in addition to the occupancy rights guaranteed to rent-regulated tenants under the rent control and rent stabilization statutes, thereby providing non-eviction protection even for apartments whose rents are not controlled by the state.

The RTC argues, without contesting any of the above, that the tenants nevertheless hold their apartments by leases which it can repudiate under FIRREA. The RTC asserts that the tenants hold their apartments pursuant to either 1) the leases which existed prior to application of rent regulation laws, or 2) the leases which remain under a holdover tenancy after preemption of state law. RTC's brief in opposition to State's motion for summary judgment, at 27. Both these arguments put the proverbial cart before the horse, however. The first ignores the fact that the state rent and securities laws do exist, and that whatever lease or other landlord-tenant relationship existed prior to the enactment of those laws is now irrelevant. The second is simply illogical, since it fails to realize that the state laws will be preempted only if FIRREA grants the RTC power to repudiate statutory tenancies. Whatever leases exist after preemption be-

comes relevant only after preemption has been decided, not before. Furthermore, even if there is a contractual element to the landlord-tenant relationship under the rent regulations and securities laws, the above discussion demonstrates that the tenants' right of occupancy is still independent of that contractual or lease relationship. Therefore, the RTC's power to repudiate whatever lease or contract exists does not affect the occupancy rights, which are secured by statute.

Accordingly, the State is correct that the East 57th Street tenants, as well as other rent-regulated or non-purchasing cooperative or condominium tenants in New York, enjoy occupancy rights that are independent of any lease they may have with their landlords, in this case the RTC.

B. *Does the "any contract or lease" language of FIRREA include statutory tenancies?*

As noted above, section 1821(e)(1) of FIRREA empowers the RTC to repudiate or disaffirm "any contract or lease" that it deems, in its discretion, to be burdensome to the failed institution. Since rent-regulated and non-purchasing cooperative or condominium tenants hold their apartments pursuant to statutory tenancies rather than traditional leases, the issue now presented is whether FIRREA's statutory language, "any contract or lease," is broad enough to include the statutory tenancies.

The RTC initially argues that the court is prevented from interpreting this section of FIRREA by 12 U.S.C. § 1821(j), which provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors [of the RTC] by resolution or order, to restrain or affect the exercise of powers or functions of the [RTC] as a conservator or a receiver.

Just what this section of FIRREA means is disputed by the parties. The RTC seeks to interpret it broadly, as a

prohibition on the construction or interpretation of FIRREA by federal courts absent an express invitation to do so by the RTC itself. This broad interpretation, however, would be unconstitutional and is therefore untenable. As the court in *Rosa v. Resolution Trust Corp.*, 752 F.Supp. 1231 (D.N.J.1990), observed, " 'FIRREA did not, and Constitutionally could not, divest an aggrieved plaintiff of the right to seek legal redress when the very subject of the grievance is agency action that is allegedly arbitrary and statutorily impermissible.' " *Id.* at 1236 (quoting *Rechler Partnership v. Resolution Trust Corp.*, No. 90 Civ. 3091 (D.N.J. Sept. 4, 1990), slip op. at 4.9-4.10).[3] While any judicial interpretation of FIRREA would, in its most general sense, "restrain" the RTC, this broad interpretation of the prohibition in section 1821(j) would "vest RTC with unreviewable power to do as it pleases," and thereby constitute a clear violation of the separation of powers. *Rechler Partnership, supra,* at 4.8.

The State advocates a narrower view of section 1821(j), characterizing it as at most a restraint on federal court interference with the substantive decisions of the RTC, not as a prohibition against judicial interpretation and construction of FIRREA. This is the interpretation adopted by the Third Circuit in *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 397-98 (3d Cir.1991). There, the court first considered what the RTC's "powers or functions" were under FIRREA, and then examined

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[3] The RTC notes that *Rosa* was overturned by the Third Circuit. While the district court's preliminary injunction was indeed reversed, *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3d Cir.1991), the appeals court did not reject the district court's reasoning regarding the scope of section 1821(j). Instead, the court stressed that its ruling involved only "application of section 1821(j) to a portion of this injunction, and we express no opinion as to the general scope of the language of that provision." 938 F.2d at 399 n. 21. The rest of the appellate opinion in *Rosa* is consistent with the narrower interpretation of this section discussed below.

whether the disputed court action would "restrain or affect" those statutory powers and thereby violate section 1821(j). Undertaking the same analysis here, it is clear that the court's efforts to interpret FIRREA in this case will not restrain the exercise of the RTC's powers or functions, and therefore will not run afoul of section 1821(j), if those powers or functions do not include the repudiation of statutory tenancies. Therefore, the dispute about the prohibition of section 1821(j) effectively merges with the determination of whether section 1821(e)(1) expressly preempts the state rent and securities laws, since if the "any contract or lease" language in section 1821(e)(1) does not include statutory tenancies, there will be no preemption and no judicial "interference" as restricted by section 1821(j).

Returning therefore to the construction of "any contract or lease" in section 1821(e)(1), the case of *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr.S.D.N.Y. 1986) is instructive once again. In that case, the bankruptcy court considered whether a trustee in bankruptcy might, pursuant to section 365 of the Bankruptcy Code, 11 U.S.C. § 365, remove rent-controlled tenants from apartments owned by the bankrupt party. Section 365 empowers the trustee to "assume or reject any executory contract or unexpired lease of the debtor," just as section 1821(e)(1) of FIRREA authorizes the RTC to repudiate or disaffirm "any contract or lease." The *Friarton* court remarked that the trustee's power to remove statutory tenants under the authorization of section 365 was "suspect," since, as noted above, rent-regulated tenants do not hold leases, but rather statutory tenancies. *Friarton, supra*, 65 B.R. at 592.[4] The same reasoning applies here,

[4] The court in *Friarton* set forth two alternative grounds for its holding that the debtor could not avoid the strictures of the state rent control laws through bankruptcy. One is its construction of the "executory contract or unexpired lease" language in section 365, discussed above. The other ground for its holding was that, under 28 U.S.C. § 959(b), trustees in bankruptcy are obligated

where the plain language of the statute, "any contract or lease," does not include rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant. *Cf. Patterson v. Federal Deposit Ins. Corp.*, 918 F.2d 540, 543 (5th Cir. 1990) (finding that since plaintiff's homestead right was protected by the Texas constitution, it was independent of any agreement between the parties and therefore not included within term "agreement" in 12 U.S.C. § 1823 (e)).

Lending further support to the view that "any contract or lease" should not be interpreted broadly to include non-lease statutory rights of occupancy is Congress' list of duties and goals for the RTC. 12 U.S.C. § 1441a (b)(3)(C) instructs the RTC to conduct its operations in a manner which:

> (i) maximizes the net present value return from the sale or other disposition of institutions . . . or assets of such institutions;
>
> (ii) minimizes the impact of such transactions on local real estate and financial markets;
>
> (iii) makes efficient use of funds obtained from the Funding Corporation or from the Treasury;
>
> (iv) minimizes the amount of any loss realized in the resolution of cases;
>
> (v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

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to obey all "valid laws of the state," thereby requiring compliance with the state rent regulatory laws. The RTC seeks to distinguish *Friarton* by pointing out that there was no preemption of state law in that case because of section 959(b). That argument, while true, does not diminish the fact that the *Friarton* court's construction of the "executory contract or unexpired lease" language is still relevant to the construction issue presented here.

The court may look to all of these instructions for guidance in interpreting the other provisions of FIRREA that set forth the powers Congress granted the RTC. *See King v. St. Vincent's Hosp.*, —— U.S. ——, ——, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991) ("a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."); (citations omitted). Three of the instructions are relevant to the RTC's powers under section 1821(e)(1). Subdivision (i), which instructs the RTC to maximize the net present value return of the assets of failed thrift institutions under its control, clearly weighs in favor of an expansive interpretation of the RTC's repudiation powers under section 1821 (e)(1). Such expansive powers would enable the RTC to increase the value of its apartments under rent and securities law restrictions. However, Congress's admonition to the RTC in subdivision (ii) to minimize the impact of the RTC's actions on the real estate market weighs in favor of a narrow construction of section 1821 (e)(1). Broadening the powers of the RTC under section 1821(e)(1) by allowing it to repudiate tenants' non-lease rights of occupancy would negatively affect the real estate market in New York, and thus run counter to 12 U.S.C. § 1441a(b)(3)(C)(ii).[5] Further, subdivision (v), which requires the RTC to maximize the preservation of affordable housing, also weighs against expanding the scope of the RTC's powers under section 1821(e)(1), since some of the tenants potentially affected by the

[5] The effect of the real estate market in New York can be appreciated by the following figures: As of February, 1991, the RTC was in control of approximately 1,000 rent-regulated condominium or cooperative apartments in New York State. It expected about 1,000 more such apartments to come into its control over the next year. Affidavit of Frederick K. Mehlman, Jan. 8, 1992, Exhibits AA and BB. Interpreting section 1821(e)(1) to include the power to repudiate non-lease statutory occupancy rights would remove all of these apartments from rent and securities laws restrictions, and would certainly have a large impact on the real estate market in New York.

RTC's asserted power to repudiate leases in this situation are undoubtedly low- and moderate-income tenants. This is true despite the fact that there is no indication in the present record that the tenants of the nine East 57th Street units are low- or moderate-income individuals, and that New York's rent protections are not linked to income.[6]

Accordingly, two of the three relevant goals behind the RTC's powers counsel a restricted rather than expansive interpretation of the RTC's powers. Therefore, the court declines to expand the reach of section 1821(e)(1) beyond traditional leases and contracts, especially in light of the presumption against preemption that operates in this case. *See Rowe v. Pierce*, 622 F.Supp. 1030, 1033 (D.D.C.1985).

Having determined that the RTC's repudiation powers under section 1821(e)(1) do not extend to statutory tenancies created under state law, and that rent-regulated or non-purchasing tenants of cooperative or condominium apartments hold statutory tenancies instead of leases, it is clear that the RTC's rights, powers, and privileges do not include the power to evict rent-regulated or non-purchasing tenants of cooperative or condominium apartments. Since the state's rent control, rent stabilization, and real estate securities laws therefore do not subject the RTC to state supervision or direction in the exercise of its rights, powers and privileges, those laws are not expressly preempted by FIRREA. 12 U.S.C. § 1821(c)(2)(C).

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[6] While the RTC's policy statement on repudiation does exempt low- and moderate-income tenants from eviction, this is irrelevant to the scope of the RTC's *power* under section 1821(e)(1) to repudiate statutory tenancies. Since section 1821(e)(1) says nothing about income levels, if the section is interpreted to encompass the power to repudiate statutory tenancies, the RTC would not be required to adopt the income exemption that it has in fact adopted in this case.

The RTC's arguments on express preemption misunderstand the issues before the court. In all of the cases cited by the RTC, there was clear power in the federal statute to do whatever the government agency sought to do. Here, no such power exists. Accordingly, those cases are inapposite. *See, e.g., Resolution Trust Corp. v. Elman*, 949 F.2d 624 (2d Cir.1991) (RTC's clear power under section 1821(d)(5)(D) to disallow any claim by a creditor or claim of security or priority preempts state retaining lien law); *Federal Deposit Ins. Corp. v. Shain, Schaffer & Rafanello*, 944 F.2d 129 (3d Cir.1991) (same).

III. *Conflict Preemption*

The court must next consider whether FIRREA has preempted the state rent and securities laws because of a conflict between state and federal law. A conflict exists when application of the state laws will create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987) (citations omitted); *see also ARC America Corp., supra*, 490 U.S. at 100-101, 109 S.Ct. at 1664-1665; *Silkwood, supra*, 464 U.S. at 248, 104 S.Ct. at 621. Preemption will depend, therefore, on what Congress' objectives were in enacting FIRREA, and on whether the state laws present an obstacle to their accomplishment.

The RTC argues that its congressional mandate under FIRREA to "manage and resolve" failed thrift institutions effectively preempts all state laws that conflict in any way with its efforts to resolve the failed institutions, and that since the state rent and securities laws involved here conflict with those efforts, they are perforce preempted. These contentions do not withstand analysis, however.

First, the RTC claims that there is a direct conflict in this case between state laws that prevent repudiation of residential "leases" and FIRREA's provision authoriz-

ing such repudiation. As the prior discussion demonstrates, however, no such direct conflict exists, since FIRREA does not provide the power the RTC seeks to exercise in this case. FIRREA does not authorize the RTC to repudiate statutory tenancies, and since the tenants in this case enjoy occupancy rights by virtue of those statutory tenancies, the RTC has no power to evict the tenants. Thus, the situation here is not one where a federal statute allows certain agency action while state laws prohibit it, as the RTC claims.

Second, the RTC complains that the state laws effectively thwart its efforts to comply with Congress' mandate to "maximize the net present value return from the sale or other disposition of institutions . . . or the assets of such institutions." 12 U.S.C. § 1441a(b)(3)(C). Therefore, the RTC argues, the state rent and securities laws should be preempted in order to allow the RTC to accomplish its mandate. The congressional mandate in section 1441a(b)(3)(C), however, is an instruction to the RTC on how to exercise the powers granted to it under other sections of FIRREA; it is not a grant of power in itself. The fact that the RTC would be freer to pursue one of its statutory goals if the state law restrictions did not exist does not by itself require preemption, since no conflict exists between federal statutory power and state statutory restrictions.

Further, since Congress did not give the RTC the power that it seeks to exercise here, i.e. to repudiate statutory tenancies, such repudiation cannot be part of the objectives of Congress that the court must consider under the conflict preemption analysis. While the RTC's inability to evict rent-regulated tenants may indeed hinder its resolution efforts, since hinderance derives not from restrictions state laws place on the powers of the RTC, but rather from the fact that Congress did not give the RTC the power to repudiate statutory tenancies in the first place. Therefore, the RTC's protestations that state

rent and securities laws thwart its efforts to dispose of the assets of failed savings and loans are misdirected. The RTC should be complaining to Congress, not to the State of New York, since it is Congress that has impaired the RTC's ability to repudiate statutory tenancies, not New York State. Absent the statutory power it seeks, there is no conflict between federal and state laws in this area, and consequently no basis for preemption of the state rent and securities laws.

The cases cited by the RTC in its conflict preemption brief all deal with direct conflict between specific powers granted in federal statutes and contrary state law restrictions, and are therefore inapposite to the question presented here. *See, e.g., Colorado ex rel. Colorado State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 936 (10th Cir.1991) (conflict between 12 U.S.C. § 1836 (k), which allows emergency acquisitions of bank branches notwithstanding any provision of state law, and state laws prohibiting branch acquisition through mergers); *Feedral Deposit Ins. Corp. v. Bank of Boulder*, 911 F.2d 1466 (10th Cir.1990) (conflict between state law prohibition of assignment of letters of credit and 12 U.S.C. § 1823(c)(2)(A), which contains clear authorization for FDIC to purchase assets and liabilities of insured savings and loans); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1501 (5th Cir. 1990) (conflict between federal statute allowing FDIC to transfer fiduciary appointments of an insolvent bank to federally established bridge banks and state statutes forbidding such transfers); *Valley Ranch Dev. Co. v. Sunbelt Sav. FSB*, 714 F.Supp. 817 (N.D.Tex.1989) (conflict between Texas fraudulent transfer statute and FSLIC's power under federal statute to transfer assets in its discretion).

While Congress certainly intended FIRREA to give the RTC broad powers,[7] the fact remains that it did not give

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[7] In creating the RTC, Congress intended to "enhance certain powers of the FDIC and to eliminate impediments to the efficient

the RTC the power to repudiate statutory tenancies. The RTC cannot enlarge its powers under FIRREA by arguing that Congress' objectives for it were broader than the powers granted by statute; conflict preemption doctrine cannot be used to give the RTC powers that Congress did not see fit to confer on the corporation. Conflicts only exist where there is power under federal statute that is prohibited under state law. Since the power prohibited by state law in this case was never granted to the RTC in the first place, no preemption of state law is possible here.

IV. *Lloyd Ribner's Rights of Succession*

The RTC also moves for declaratory judgment that it is entitled to evict one of the individual tenants, Lloyd Ribner, Jr., from apartment 14-E at 444 East 57th Street. Ribner seeks to succeed to the occupancy rights of his recently deceased mother. The RTC contends that, even if it is subject to the state rent control and securities laws, Ribner has no right to occupy this apartment. Under the rent control law, a person is entitled to succeed to the right of possession of a rent-controlled apartment where

> [the] family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a "senior citizen" or "disabled person" . . .

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resolution of failed financial institutions." *Federal Deposit Ins. Corp. v. Shain Schaffer & Rafanello*, 944 F.2d 129, 131 (3d Cir. 1991); *see also Smallwood v. Office of Thrift Supervision*, 925 F.2d 894 (6th Cir.1991). FIRREA evidences congressional intent to give broad powers to the RTC to resolve the crisis in the savings and loan industry, including powers that the savings and loans did not enjoy prior to being taken over by the RTC. *See, e.g.*, 12 U.S.C. § 1825(b) (no involuntary liens against the property of the receiver); 12 U.S.C. § 1821(d)(12) (mandatory 90-day stay of pending litigation); 12 U.S.C. §§ 1829 and 1822 (no bonds required of the FDIC).

> for a period of no less than one year immediately prior 'o the permanent vacating of the housing accommodation by the tenant. . . .

N.Y. Comp.Codes R. & Regs., tit. 9, part 2204.6(d)(1) (1990). Ribner alleges that he lived with his mother in the apartment for the requisite period of time. *See* Affidavit of Lloyd Ribner, Jr., Jan. 24, 1992, ¶ 2; Reply Affidavit of Lloyd Ribner, Jr., Jan. 31, 1992, ¶ 1. The RTC presents evidence that he did not occupy the apartment for the required time period, and that he is therefore not entitled to succeed to his mother's tenancy. Affidavit of David A. Yadgaroff, Jan. 30, 1992, ¶¶ 2-4. Given this dispute as to the facts concerning Ribner's occupancy of the apartment, summary judgment cannot be granted to either side on this issue. Rule 56, F.R.Civ.P.[8]

Nevertheless, Ribner points out that the RTC is required by the rent control laws to give him thirty days' notice before bringing any proceeding to regain possession of the apartment. N.Y. City Admin.Code, 26-403 (e)(2)(i)(10) *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987); *Louis v. Barthelme*, 179 A.D.2d 604, 579 N.Y.S.2d 656 (1st Dep't 1992). The record contains no indication that such a notice was ever served upon Ribner. Accordingly, the RTC's complaint must be dismissed as against Ribner.

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[8] Ribner's counsel cites New York procedural law throughout his brief in support of summary judgment. Counsel is reminded that in federal court, even where state law provides the substantive rule of decision, the Federal Rules of Civil Procedure, as explicated in the decisions of federal courts, govern procedural matters such as the standard for summary judgment. *See* Rule 56, F.R.Civ.P.; *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

V. *Conclusion*

In sum, the State's motion for summary judgment is granted and the RTC's motion for summary judgment is denied. FIRREA has not preempted New York's rent control law, its rent stabilization law, or the sections of its general business law dealing with the offer and sale of securities, and the RTC must abide by their provisions. Further, the motion of Lloyd Ribner, Jr., to dismiss the complaint in No. 91 Civ. 1361 as against him is granted.

IT IS SO ORDERED.

APPENDIX C

SELECTED NEW YORK STATE STATUTORY PROVISIONS

Emergency Housing Rent Control Law, N.Y. Unconsol. L. (McKinney 1987)

§ 8585. Evictions

1. So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodation with respect to which a maximum rent is in effect pursuant to this act by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his lease, or other rental agreement has expired or otherwise terminated, notwithstanding any contract, lease agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto . . . .

§ 8590. Prohibitions

1. It shall be unlawful, regardless of any contract, lease or other obligation heretofore or hereafter entered into, for any person to demand or receive any rent for any housing accommodations in excess of the maximum rent or otherwise to do or omit to do any act, in violation of any regulation, order or requirement hereunder, or to offer, solicit, attempt or agree to do any of the foregoing.

New York State Rent and Eviction Regulations, 9 N.Y. Comp. Codes R. & Regs., codified after N.Y. Unconsol. L. § 8597 (McKinney 1987)

§ 2100.12. Withdrawal from rental market

Nothing in this Subchapter shall be construed to require any person to offer any housing accommoda-

tions for rent, but housing accommodations already on the rental market may be withdrawn only after an order is issued by the Administrator under section 2104.9, if such withdrawal requires that a tenant be evicted from such accommodations.

§ 2104.1. Restrictions on removal of tenant, including hotel tenants

(a) So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease, or other rental agreement has expired or otherwise terminated, notwithstanding any contract, lease agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto

. . . .

§ 2104.9. Withdrawal of occupied housing accommodations from rental market

A certificate shall be issued where the landlord establishes that he seeks in good faith to permanently withdraw occupied housing accommodations from both the housing and nonhousing rental markets without any intent to rent or sell all or any part of the land or structure and (a) that he requires the entire structure containing the housing accommodations or the land for his own immediate use in connection with a business which the landlord owns and operates in the immediate vicinity of the property in question, or

* * * *

(d) that the continued operation of the housing accommodations would impose other undue hard-

ship upon him. No certificate shall be issued under this section where the granting of the certificate is inconsistent with the purposes of the Act.

The Martin Act, N.Y. Gen. Bus. L. § 352-eeee.2(c)(ii) (McKinney 1984)

§ 352-eeee. Conversions to cooperative or condominium ownership in the city of New York

2(c)(ii) No eviction proceedings will be commenced at any time against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy; provided that such proceedings may be commenced for non-payment of rent, illegal use or occupancy of the premises, refusal of reasonable access to the owner or a similar breach by the non-purchasing tenant of his obligations to the owner of the dwelling unit or the shares allocated thereto; and provided further that an owner of a unit or of the shares allocated thereto may not commence an action to recover possession of a dwelling unit from a non-purchasing tenant on the grounds that he seeks the dwelling unit for the use and occupancy of himself or his family.

SELECTED NEW YORK CITY STATUTORY PROVISIONS

New York City Rent Control, N.Y.C. Admin. Code, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987)

§ 26-408. Evictions

a. No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this chapter [1] by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto . . . .

* * * *

j. (1) Nothing in this chapter shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the city rent agency, if such withdrawal requires that a tenant be evicted from such accommodations.

New York City Rent and Eviction Regulations, 9 N.Y. Comp. Codes R. & Regs., codified after N.Y. Unconsol. L. § 8597 (McKinney 1987)

§ 2200.12. Withdrawal from rental market

Nothing in these regulations shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the market may be withdrawn only after an order

is issued by the administrator under section 2204.9 of this Title, if such withdrawal requires that a tenant be evicted from such accommodations.

§ 2204.1. Restrictions on removal of tenants, including hotel tenants

(a) No tenant, so long as he continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation by action to evict or to recover possession, by exclusion from possession or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that the tenant has no lease or that his lease, or other rental agreement, has expired or otherwise terminated, and notwithstanding any contract, lease agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto . . . .

§ 2204.9. Withdrawal of occupied housing accommodations from rental market

(a) A certificate shall be issued where the landlord establishes that he seeks in good faith permanently to withdraw occupied housing accommodations from both the housing and nonhousing markets, without any intent to rent or sell all or any part of the land or structure, and:

> (1) that he requires the entire structure containing the housing accommodations or the land for his own immediate use in connection with a business which, at the time of the filing of the application for a certificate of eviction, he owns and operates in the immediate vicinity of the property in question;
>
> * * * *
>
> or

(4) that the continued operation of the housing accommodations would impose other undue hardship upon the landlord.

New York City Rent Stabilization, N.Y.C. Admin. Code, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987)

§ 26-511. Real state industry stabilization association

c. A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code

* * * *

(4) includes provisions requiring owners to grant a one or two year vacancy or renewal lease at the option of the tenant . . .

* * * *

(9) provides that an owner shall not refuse to renew a lease . . . .

§ 26-512. Stabilization provisions

a. No owner of property subject to this law shall charge or collect any rent in excess of the initial legal regulated rent or adjusted initial legal regulated rent until the end of any lease or other rental agreement in effect on the local effective date until such time as a different legal regulated rent shall be authorized pursuant to guidelines adopted by a rent guidelines board.

New York City Rent Stabilization Code, 9 N.Y. Comp. Codes R. & Regs., codified after N.Y. Unconsol. L. § 8634 (McKinney 1987)

§ 2522.5. Lease agreements

(b) Renewal lease.

(1) For housing accommodations other than hotels, upon such notice as is required by sec-

tion 2523.5 of this Title (Notice for Renewal of Lease and Renewal Procedure), the tenant shall have the right of selecting at his or her option a renewal of his or her lease for a one or two year term . . . .

The owner shall furnish to the tenant signing a renewal lease from pursuant to section 2523.5 of this Title, a copy of the fully executed renewal lease form, bearing the signatures of the owner and tenant, and the beginning and ending dates of the lease term, within 30 days from the owner's receipt of the renewal lease form signed by the tenant. Such renewal lease form shall conform to the intent of section 5-702 of the General Obligations Law.

(2) Upon complaint by the tenant that he or she was not served with a copy of the fully executed . . . renewal lease . . . the DHCR shall order the owner to furnish the copy of the . . . renewal lease form. In addition to any other penalties provided under this Code, noncompliance by the owner within 20 days of such order shall result in the denial of any rent guideline increases for . . . renewal leases until the fully executed copy of the . . . renewal lease form is furnished by the owner of the tenant.

§ 2524.1. Restrictions on removal of tenant

(a) As long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or be removed from any housing accommodation by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession . . .

§ 2524.4. Grounds for refusal to renew lease, or in hotels, discontinuing a hotel tenancy, without order of the DHCR

The owner shall not be required to offer a renewal lease to a tenant, or in hotels, to continue a hotel tenancy, and may commence an action or proceeding to recover possession in a court of competent jurisdiction, upon the expiration of the existing lease term, if any, after serving the tenant with a notice as required pursuant to section 2524.2 of this Part (Termination Notices) only on one or more of the following grounds:

(a) Occupancy by owner or member of owner's immediate family.

(1) An owner who seeks to recover possession of a housing accommodation for such owner's personal use and occupancy as his or her primary residence in the City of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York, except that tenants in a non-eviction conversion plan pursuant to section 352-eeee of the General Business Law may not be evicted on this ground on or after the date the conversion plan is declared effective.

§ 2524.5. Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR

(a) The owner shall not be required to offer a renewal lease to a tenant . . . upon any one of the following grounds:

(1) Withdrawal from the rental market.

The owner has established to the satisfaction of the DHCR after a hearing, that he or she seeks in good faith to withdraw any or all hous-

ing accommodations from both the housing and non-housing rental market without any intent to rent or sell all or any part of the land or structure and:

(i) that he or she requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates.

(2) (2)

No. 93-1748 and 93-1757

Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

LILLIAN SOLOMON, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., ET AL.

SUSAN SOLOMON PATULLO, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1821(e) (Supp. IV 1992) grants the Resolution Trust Corporation the authority, as receiver for a failed depository institution, to repudiate leases that are governed by state and local rent-control regulations.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1748

LILLIAN SOLOMON, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., ET AL.[1]

No. 93-1757

SUSAN SOLOMON PATULLO, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

---

[1] Jerome Lederer was a party to the case in the court of appeals. The petitions indicate that he has died and that his estate is not seeking review of the judgment of the court of appeals. 93-1748 Pet. ii; 93-1757 Pet. ii. His estate is accordingly a respondent under this Court's Rule 12.4.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 18 F.3d 111.[2] The opinion of the district court (Pet. App. 36a-58a) is reported at 801 F. Supp. 1152.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1994. The petitions for a writ of certiorari were filed on May 4, 1994 (93-1748) and May 5, 1994 (93-1757). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Resolution Trust Corporation (RTC) was formed under 12 U.S.C. 1441a(b) (Supp. IV 1992) and was granted, in Section 1441a(b)(4)(A), the "same powers and rights to carry out its duties with respect to [certain federally insured depository] institutions * * * as the Federal Deposit Insurance Corporation has under sections 1821, 1822, and 1823 of [Title 12]."[3] Section 1821(c)(1) authorizes the RTC to accept an appointment and act as receiver for such an institution.

Section 1821(e) describes the powers of such a receiver with respect to leases and other preexisting contracts of the institution. Section 1821(e)(1) provides that the receiver

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[2] References to "Pet. App." are to the appendix to the petition in No. 93-1757.

[3] The grant of authority in Section 1441a(b)(4)(A) refers to institutions described in Section 1441a(b)(3)(A), which are institutions whose accounts were insured by the Federal Savings and Loan Insurance Corporation before August 9, 1989, and for which a conservator or receiver was appointed between December 31, 1988, and October 1, 1993.

"may * * * repudiate any * * * lease * * * to which such institution is a party," if the receiver "determines" that "the performance of [the lease would] be burdensome," and if the receiver also "determines, in the * * * receiver's discretion, [that repudiation] will promote the orderly administration of the institution's affairs." Section 1821(e)(5) specifies the remedies available to a tenant if the RTC repudiates a lease under Section 1821(e)(1). If the tenant is not in default, the tenant has the option of either treating the lease as terminated by the repudiation or remaining in possession for the balance of the term of the lease, in which event the tenant must continue to pay the rent due under the terms of the lease.

In February, 1991, the Board of Directors of the RTC adopted and issued a policy statement limiting the circumstances in which it would exercise its powers under Section 1821(e) to remove tenants from properties subject to state and local rent-control and rent-stabilization regulations. C.A. App. A55-A57. Under that policy, "[i]t is clearly the intention of the Board of Directors to avoid displacing low and moderate income tenants from such units." *Id.* at A55. Accordingly, if "the RTC finds that units are leased by low or moderate income tenants, the RTC will not exercise its disaffirmance or repudiation powers with respect to those units." *Id.* at A56.[4] With respect to units not occupied by low or moderate income tenants, however, the statement concluded that "[t]he RTC, and ultimately the taxpayers, cannot be put in the position of continuing to underwrite rental of such units at a significant loss to the

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[4] The statement defined a low or moderate income tenant as "a family or individual whose income does not exceed one hundred and fifteen percent (115%) of the median income in the area involved, as determined by the U.S. Secretary of Housing and Urban Development, with adjustments for family size." C.A. App. A56-A57.

RTC." *Id.* at A55. Thus, the Board of Directors "determined that disaffirmance or repudiation of leases of these units * * * is required in these circumstances." *Id.* at A56.

2. This case involves the tenants of nine apartments in a building located at 444 E. 57th Street in New York City. Each of those apartments is subject to provisions of state and local law that either directly control the rent payable under those leases or specify the increases in rent that are permissible in any given year. In the mid-1980s, the owner of the apartments granted a security interest in the apartments to Nassau Federal Savings and Loan Association to secure a loan of $3.2 million. When the owner defaulted on the loan in 1987, Nassau Federal became the owner of the apartments. Nassau Federal, in turn, failed in March, 1990, and the RTC was appointed receiver. After determining that it was losing more than $18,000 per month on the building, the RTC as receiver notified the tenants that it was repudiating their tenancies under Section 1821(e). See Pet. App. 5a-10a.[5]

3. When the tenants and various state officials disputed the authority of the receiver to repudiate the tenancies, the RTC filed this action in the United States District Court for the Southern District of New York, seeking a declaration that it had the power to repudiate the tenancies in question. The district court granted summary judgment for petitioners, concluding that the RTC as receiver does not have the authority to repudiate the tenancies. Pet. App. 36a-58a. The court stated that applicable New York laws create "statutory tenancies" (*id.* at 44a), under which the tenants enjoy "occupancy rights that are independent of any lease they may have with their landlords" (*id.* at

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[5] The record does not indicate that any of the tenants are persons of low or moderate income protected by the RTC's policy statement. See Pet. App. 11a.

48a). The court reasoned that the power granted in Section 1821(e)(1) does not authorize repudiation of those tenancies, because they rest on a statute, not on a "contract" or "lease" subject to repudiation under Section 1821(e)(1). Pet. App. 48a-53a.

4. The court of appeals reversed. Pet. App. 1a-35a. Based on a detailed consideration of applicable New York laws (*id.* at 17a-24a), the court rejected petitioners' claims that those laws "creat[e] a statutory tenancy that is in effect non-contractual, and beyond the reach of RTC's repudiation power." *Id.* at 17a. The court concluded instead that

> New York's statutory tenancies—whether under rent stabilization or rent control—are contract-based leaseholds. That being the case, they fall within the express language of § 1821(e), and are subject to RTC's statutory power to repudiate. By repudiating the contract or lease creating the tenancy, RTC is effectively dissolving the tenancy. Once it has done so, no statutory or regulatory provision—at least none that can pass constitutional muster—can revive that tenancy.

Id. at 22a. The court noted that its conclusion that Section 1821(e) allows the RTC to terminate tenancies that could be extended indefinitely by the tenant under state law was supported by the contrast between the absolute repudiation right granted in Section 1821(e) and the lease termination provision in the Bankruptcy Code, which expressly permits a tenant of a bankrupt landlord to renew or extend the lease whenever the tenant has a right to such a renewal or extension "that is enforceable by such lessee under applicable nonbankruptcy law." Pet. App. 24a-26a (discussing 11 U.S.C. 365(h)(1)).

The court then turned to petitioners' argument that the leasehold in a rent-controlled apartment is perpetual and thus not subject to repudiation because of the provisions of Section 1821(e)(5) that allow a tenant to remain in occupancy until the end of the term of its lease. Pet. App. 26a-29a. The court rejected that argument based on its conclusion that the lease term of a rent-controlled apartment ends at the end of the biennial period provided for review of rent under the rent-control laws. *Id.* at 28a-29a.

The court also rejected petitioners' argument that the RTC erred in determining that the tenancies were burdensome. Pet. App. 29a-30a. The court explained:

> It is uncontroverted that (a) these tenancies are causing RTC to lose close to $19,000 per month and (b) these occupied rent-regulated units are worth millions of dollars less than they are worth vacant or free of rent regulations. It cannot be said therefore that RTC abused its discretion in finding these tenancies burdensome.

Id. at 30a.

ARGUMENT

Petitioners contend that the court of appeals erred in concluding that 12 U.S.C. 1821(e)(1) (Supp. IV 1992) authorizes a federal receiver for a failed depository institution to terminate leases protected by New York State and City rent regulations. 93-1748 Pet. 11-28; 93-1757 Pet. 11-17. The conclusion of the court of appeals is, however, completely consistent with the text of Section 1821. Moreover, the decision below is the first to consider the questions raised by the petitions. Review of those questions by this Court at this time would therefore be premature.

1. Section 1821(e)(1) authorizes the RTC in specified circumstances to "repudiate any contract or lease * * * to

which [the failed] institution is a party." The term "lease" generally refers to "[a]ny agreement which gives rise to [a] relationship of landlord and tenant * * * or lessor and lessee." *Black's Law Dictionary* 889 (6th ed. 1990). Each individual petitioner's right to possession of one of the apartments owned by the receiver is derived from such an agreement. The RTC's repudiation of each agreement terminates the tenant's entitlement to remain in possession after the end of the present lease term.

Applicable New York state and local laws have altered many of the terms of the lease agreements, severely limiting (if not eliminating) the capacity of a landlord to enforce provisions that originally entitled the landlord to terminate a tenant's right of occupancy. Those laws do not, however, remove the lease agreement as the foundation of the tenancy; rather, they alter the terms of the lease as a matter of local law. The individual petitioners thus hold rights to occupy real estate based on agreements that have been modified and regulated by state law. The court of appeals' conclusion that those rights constitute a "lease" for purposes of Section 1821 is a reasonable one.

2. Petitioners' arguments do not successfully refute the court of appeals' conclusion that a right of occupancy founded on an agreement remains a "lease," even though state law may regulate or modify the terms of occupancy.

a. The principal argument of petitioners in No. 93-1748 is that the court of appeals erred by allowing the RTC to extend its right to terminate a "lease" to include the right to terminate an "obligation * * * not created by a contract or lease, [which] indeed applies notwithstanding a contrary contract or lease." 93-1748 Pet. 15.[6] That analy-

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[6] See 93-1748 Pet. 23-25 (arguing that court of appeals erred in allowing power to terminate agreements to extend to "obligations

sis misconstrues the nature of the RTC's action. The RTC has not directly taken any action with respect to any obligation imposed by the tenant-protective state laws on which petitioners rely. That situation would arise if the RTC asserted a right to raise the rents under the existing tenancies in derogation of applicable state laws, or insisted on exercising a right of termination found in the original lease, notwithstanding provisions of state law barring exercise of that right. Instead, the RTC has repudiated the entire underlying agreement on which the tenant's right of occupancy is founded, relying not on any provision of the agreement itself, but on the explicit, supervening authority of Section 1821(e). The court of appeals has decided that the complex of rights the tenant holds pursuant to its original agreement and the applicable provisions of state law constitutes a "lease" within the meaning of Section 1821; as such, it is subject to repudiation under that Section.

b. Petitioners err in asserting that the decision below "is in direct conflict with the relevant New York cases." 93-1757 Pet. 12. As the court of appeals noted (Pet. App. 15a), the relevant question of state law is whether "New York law creates 'statutory' tenancies not ultimately based on a lease or other voluntary contractual arrangement." Because the tenancies are, in fact, ultimately based on a lease or other voluntary contractual arrangement, the court of appeals concluded that Section 1821(e) authorizes the RTC to repudiate them.

Petitioners identify no New York authority directly addressing the question whether a rent-controlled or rent-stabilized tenancy should be viewed as resting on a pervasively regulated agreement or as a creature of statute.

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imposed by New York's statutory tenancy laws [that] are obviously not created by any agreement").

That question is not generally relevant to a dispute between a landlord and a tenant. In the court of appeals' analysis, the key and undisputed feature of state law is that the obligations of New York's rent-control and rent-stabilization laws do not have any effect except in situations where the parties (or their predecessors in interest) previously have entered into a voluntary agreement creating a landlord-tenant relationship. Because the effect of the laws on which petitioners rely is limited to cases in which the parties initiate a voluntary relationship through consummation of a lease, the court of appeals concluded that it was accurate to characterize the relationship as a whole as a lease.

c. Petitioners argue (93-1748 Pet. 16-20) that this Court should consider whether state or federal law should determine the meaning of the term "lease" in Section 1821(e). It was entirely appropriate, however, for the court of appeals to treat the meaning of the federal statute as a federal question, while looking to state law to evaluate the nature and extent of underlying legal rights and obligations. See, *e.g.*, *United States* v. *Idaho*, 113 S. Ct. 1893 (1993) (fees characterized by Idaho law as "filing fees" rather than "costs" are nevertheless "costs" for purposes of 43 U.S.C. 666); *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580 (1992) (whether particular state law "relates to" a plan protected by ERISA is a question of federal law, dependent on the effect of the state law); *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2611 (1992) (preemption by federal statute of rules relating to "statement[s] * * * in the advertising of * * * cigarettes" is a question of federal law, dependent on the requirements of state causes of action); *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985) ("The question whether a state-law right constitutes 'property' or 'rights to property' [under 26 U.S.C. 6331(a)] is

a matter of federal law."); *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 111-112 (1983) ("Whether one has been 'convicted' within the language of the [federal] gun control statutes is necessarily * * * a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State.")

3. The court of appeals' decision in this case does not conflict with decisions of this Court or of any other court of appeals. Indeed, no other court of appeals has considered the questions presented by the petition.

a. Petitioners assert (93-1748 Pet. 16) that the decision below conflicts with this Court's decisions in *Reconstruction Finance Corporation* v. *Beaver County*, 328 U.S. 204 (1946); *United States* v. *Brosnan*, 363 U.S. 237 (1960); *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956); *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90 (1991); and *Butner* v. *United States*, 440 U.S. 48 (1979). None of those cases involved the interpretation of Section 1821(e), or of any statute containing similar language. While the decisions concededly support the proposition that "courts should adopt the applicable state law" when they interpret statutes using terms "deeply rooted in state traditions, customs, habits, and laws," 93-1748 Pet. 16 (internal quotation marks omitted), they do not support petitioners' broader argument that the meaning of terms of federal statutes is ultimately a question of state law. See, *e.g.*, *Beaver County*, 328 U.S. at 208 ("Pennsylvania's definition of 'real property' cannot govern if it conflicts with the scope of that term as used in the federal statute. What meaning Congress intended is a federal question which we must determine."); *De Sylva*, 351 U.S. at 580 ("The scope of a federal right is, of course, a federal question.").[7]

[7] See also *Deitrick* v. *Greaney*, 309 U.S. 190, 200-201 (1940) (rejecting reliance on Massachusetts law as interposing a defense to a claimed

The decisions upon which petitioners rely make clear that federal courts resolving questions of statutory interpretation should take account of relevant significant state interests,[8] and in appropriate cases adopt state-law definitions for general terms used in federal statutes. The court of appeals accordingly "consult[ed] for guidance the body of New York law concerning the design and operation of the rent regulation programs at issue." Pet. App. 15a. Petitioners identify no applicable state law that is inconsistent with the court's holding (*ibid.*) that the tenancies held by the individual petitioners in this case are "ultimately based on a lease or other voluntary contractual agreement."

b. Petitioners contend that the court of appeals' conclusion that the meaning of the term "lease" is a matter of federal law conflicts with decisions relying on state law in interpreting the power of a bankruptcy court to repudiate "any executory contract or unexpired lease of the debtor." 93-1748 Pet. 17-18 (discussing 11 U.S.C. 365(a), and citing *River Production Co.* v. *Webb* (*In re Topco, Inc.*), 894 F.2d 727 (5th Cir. 1990); *Mitchell* v. *Streets* (*In re Streets & Beard Farm Partnership*), 882 F.2d 233 (7th Cir. 1989)). However, neither of the cited cases held that the meaning of the terms "contract" and "lease" in federal bankruptcy statutes was a matter of state law. Rather, those decisions held—as did the court below—that a federal court should

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violation of the National Bank Act because "it is the federal statute which condemns as unlawful respondent's acts"; reasoning that "[t]he extent and nature of the legal consequences of this condemnation * * * are * * * to be derived from it and the federal policy which it has adopted").

[8] See *BFP* v. *RTC*, 114 S. Ct. 1757, 1764 (1994) ("Federal statutes impinging upon important state interests cannot be construed without regard to the implications of our dual system of government.") (internal quotation marks and ellipses omitted).

look to state law to determine the nature of the obligations under the agreements in issue, and then determine how obligations of that type should be treated under federal law. The *River Production* court thus held that an oil and gas lease was not a "lease" under Section 365 of the Bankruptcy Code because, under Texas law, it created a determinable fee interest, not a landlord-tenant relationship. 894 F.2d at 739 n.17. Similarly, the *Mitchell* court explained that "Congress intended § 365 to apply to contracts where significant unperformed obligations remain on both sides," and then "look[ed] to relevant state law" to "determin[e] the significance of the remaining obligations under a contract." 882 F.2d at 235.

c. Petitioners contend that the decision below conflicts with various decisions of this Court recognizing a distinction between obligations imposed by state law and obligations imposed by contract. 93-1748 Pet. 25-26 (citing *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992); *General Motors Corporation* v. *Romein*, 112 S. Ct. 1105 (1992); and *Armstrong* v. *United States*, 364 U.S. 40 (1960)). None of those decisions addresses the meaning of the term "lease," or any similar term, in any statute. Moreover, contrary to petitioners' contention (93-1748 Pet. 26), nothing in the opinion below suggests that repeal of New York's rent regulation laws would violate the Contract Clause as interpreted in *Romein*. The court of appeals' analysis did not treat obligations imposed under those laws as part of the contract between landlord and tenant. The court concluded only that the underlying contractual relationship remained a "lease," subject to repudiation under Section 1821(e), despite the effects of supervening state regulation that might limit or modify the lease terms at any given time.

Similarly, there is no merit in petitioners' contention (93-1748 Pet. 26) that the receiver's repudiation of the

leases constitutes a taking. Contrary to petitioners' argument, the Second Circuit has not countenanced "obliterat[ion]" (*ibid.*) of an interest in property. The Second Circuit recognized only the longstanding power of an insolvent party's representative to terminate executory contracts as part of the winding up or reorganization of the affairs of the insolvent. Compare 11 U.S.C. 365 (provisions governing rejection of executory contracts in bankruptcy). Petitioners do not suggest that the exercise of that power constitutes a taking.

d. Petitioners contend that the decision below conflicts with other decisions interpreting the term "agreement" in 12 U.S.C. 1823(e). 93-1748 Pet. 26-27 (citing *Bateman* v. *FDIC*, 970 F.2d 924 (1st Cir. 1992); *Patterson* v. *FDIC*, 918 F.2d 540 (5th Cir. 1990)); 93-1757 Pet. 15 (citing *Patterson*). Those decisions held only that obligations created by state law, independent of any private agreement, are binding on a federal receiver despite Section 1823(e)'s prohibition against enforcement of certain private "agreement[s]" that are not adequately reflected in the records of the insolvent institution. *Bateman*, 970 F.2d at 927-929 (mechanic's lien created without agreement); *Patterson*, 918 F.2d at 543-545 (state constitutional homestead interest). The court in this case, by contrast, held that a landlord-tenant relationship that commences with an agreement remains a "lease," even if state law later modifies the contractual rights of the parties. The two issues bear little relationship to one another.

e. Finally, petitioners contend that the decision below conflicts with two decisions interpreting the words "contract" and "lease" in 11 U.S.C. 365(a). 93-1748 Pet. 27-28 (citing *In re Chicago, Rock Island and Pacific Railroad*, 772 F.2d 299 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986); *Saravia* v. *1736 18th St., N.W., Limited Partnership*, 844 F.2d 823 (D.C. Cir. 1988)). Those cases con-

sidered not whether a landlord had the power to reject a lease burdened by state regulations, but rather whether tenancies that existed after rejection of a lease in bankruptcy were exempt from state laws imposing obligations on landlords. The *Rock Island* case held that a landlord was not immune from state laws regulating the rent to be charged to grain elevator operators solely because the landlord acquired the land from a trustee in bankruptcy. 772 F.2d at 302-303. Similarly, *Saravia* held that a debtor in bankruptcy was obligated to "cur[e] violations of the District of Columbia housing code" and "to continue to provide essential services" to tenants who remained in possession after the debtor rejected their leases. That case did not consider whether Section 365 granted the authority to the trustee to reject the lease itself; indeed, the court noted that "there is no dispute that the debtor properly rejected the tenants' leases." 844 F.2d at 824-825. This case, by contrast, involves the distinct question whether the RTC has the right to repudiate the tenancies in question.

4. Petitioners contend (93-1748 Supp. Br. 1-5; see 93-1748 Pet. 19-20) that the decision of the court of appeals should be vacated and the case remanded for reconsideration in light of this Court's recent decisions in *BFP* v. *RTC*, 114 S. Ct. 1757 (1994), and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994).

a. Contrary to petitioners' argument (93-1748 Supp. Br. 1-2), the decision below does not conflict with *BFP*. As with the earlier decisions of this Court on which petitioners rely at page 16 of the petition in No. 93-1748 (discussed at pages 10-11, *supra*), the point of *BFP* is only that "[f]ederal statutes impinging upon important state interests cannot be construed without regard to the implications of our dual system of government." 114 S. Ct. at 1764 (internal quotation marks and ellipses omitted). Peti-

tioners suggest (93-1748 Supp. Br. 2) that the decision below contravened that principle by "displac[ing]" applicable principles of state law. That suggestion assumes that applicable principles of state law call for a decision contrary to that of the court of appeals. As explained above, however, petitioners identify no state authority that contradicts the court of appeals' understanding of the nature of the relevant state-law obligations.

b. Petitioners also err in arguing (93-1748 Supp. Br. 3-4) that this Court's decision in *O'Melveny* calls the court of appeals' analysis into question. In that case, the Court rejected the FDIC's contention that "a federal common-law rule and not California law" governed certain issues when the FDIC was "asserting * * * causes of action created by California law." *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994), slip op. 3. This case, by contrast, involves the breadth of a federal right of repudiation expressly created by federal statute.

Petitioners contend (93-1748 Supp. Br. 4) that *O'Melveny* requires federal courts to defer to state law in determining the meaning of the reference to a "lease" in Section 1821(e). The court of appeals complied with any such requirement by examining the state-law attributes of the tenancies of the individual petitioners. Petitioners' real complaint, therefore, is that the court of appeals rejected their understanding of the applicable state law. That question does not warrant review by this Court. See, *e.g.*, *O'Melveny*, slip op. 2 (Stevens, J., concurring) (local federal judges are in best position to determine questions of local law).

Finally, petitioners contend that a portion of the analysis of the court of appeals rests on the notion—criticized in *O'Melveny*, slip op. 9—that an unqualified "desire for more money" justifies a broad interpretation of the

powers of the RTC and the FDIC. 93-1748 Supp. Br. 4 (internal quotation marks omitted). To be sure, the court of appeals stated, in the portion of its opinion determining the term of a rent-controlled lease for purposes of Section 1821(e)(5)(A)(ii), that Section 1821(e) "was conferred in aid of an acute financial emergency, and cannot be construed fairly to accommodate so prolonged a residual tenancy." Pet. App. 28a. But the court's holding on that point stated that a "[r]ent-controlled tenancy *under New York law* is therefore neither perpetual nor measured by the life of the tenant (and the tenant's successors)." *Id.* at 29a (emphasis added). Because the court's conclusion rested on its understanding of the attributes of a rent-controlled tenancy under state law, there is no reason to suppose that the court of appeals would reach a different conclusion in this case in light of *O'Melveny*.

* * * * *

The decision below represents a sound interpretation of federal law, informed by a careful analysis of relevant state law by the local federal court of appeals. The decision does not conflict with any decision of this Court, or of any other court of appeals. In addition, because no other court of appeals has had occasion to consider the questions raised in this case, review of those questions by this Court would be premature.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LILLIAN SOLOMON, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
as Receiver for Nassau Savings and
Loan Association, F.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 15.7 of the Rules of this Court, petitioners respectfully submit this supplemental brief to discuss two new decisions of this Court that were not available when the petition was filed on May 4, 1994. Those decisions are *BFP* v. *RTC*, 62 U.S.L.W. 4359 (U.S. May 23, 1994), and *O'Melveny & Myers* v. *FDIC*, No. 93-489, slip op. (June 13, 1994). The decision of the Second Circuit below is in conflict with each of these subsequent decisions of this Court. Petitioners file this supplemental brief now so that the RTC has the opportunity in its response (now due on or before July 6, 1994) to address petitioners' arguments concerning these two new decisions, and so that the Court may consider petitioners' arguments at the same time that it reviews RTC's response.

The decision of the Second Circuit below is in conflict with this Court's subsequent decision in *BFP*. The opinion of the Court in *BFP* holds that a federal court may only interpret a federal statute to preempt state law "when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation." 62 U.S.L.W. at 4364. Specifically, "[t]o displace traditional State regulation" in the area of real property, "the federal statutory purpose must be 'clear and manifest.'" *Id.* at 4363 (quoting *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990)). Otherwise, the statute "will be construed to adopt, rather than to displace, preexisting state law." *BFP*, 62 U.S.L.W. at 4363. See also *id.* at 4362 ("Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect.").*

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* Although the statute at issue in *BFP* was the Bankruptcy Code, the requirements of *BFP* apply to statutory interpretation generally. *See* Pet. 15. Moreover, the Second Circuit would certainly take seriously the effect of *BFP* on the validity of its decision. In the decision below, the Second Circuit stated that 12 U.S.C. § 1821(e) "borrowed and adopted many of the provisions of the Bankruptcy Code dealing with a lessee's rights when the debtor-lessor rejects a lease contract. See S. Rep. No. 19 at 314 (12 U.S.C. § 1821(e) was 'closely modeled on parallel provisions of section 365 of the Bankruptcy Code.')." Pet. App. 22a. In a subsequent decision, *1185 Ave. of the Americas Assocs.* v. *RTC*, 1994 U.S. App. LEXIS 8732 (2d Cir. April 26, 1994), the Second Circuit emphasized that it will interpret the repudiation powers under the Bankruptcy Code and under 12 U.S.C. § 1821(e) to be parellel:

> [W]e note that Chapter 3 of the Bankruptcy Code provides a helpful analogy. Like a conservator or receiver of a failed thrift, a trustee in bankruptcy has the power to 'assume or reject any executory contract or unexpired lease of the debtor' within a limited time period (sixty days) following appointment. 11 U.S.C. § 365(a) & (d) (1988). Like the RTC, a trustee in bankruptcy may wear more than one hat. The trustee may first be appointed as a Chapter 11 trustee, which

As the petition demonstrated, there is no dispute, and this Court's precedents hold, that rent control statutes and regulations constitute traditional state regulation of real property. See Pet. 14-15 & n.7. The decision of the Second Circuit therefore committed fundamental error in not even attempting to demonstrate how the requirement, set forth in *BFP*, of a clear and manifest purpose—i.e., unambiguous intent—of Congress to preempt rent control laws can be found in 12 U.S.C. § 1821(e). Indeed, the Second Circuit did not even acknowledge the standard set forth in *BFP*, even though the district court expressly relied on that standard. See Pet. App. 36a-37a. Moreover, as the petition demonstrated, using the *BFP* standard, no clear and manifest purpose and unambiguous intent to displace state rent control law can be discerned or even contrived from 12 U.S.C. § 1821(e). See Pet. 14-28. The conflicts between *BFP* and the Second Circuit decision in both the governing standard and result are irreconcilable.

The Second Circuit's decision is also contradicted in three respects by this Court's subsequent decision in *O'Melveny*. First, *O'Melveny* holds that the phrase "rights . . . *of the insured depository institution*" in 12 U.S.C. § 1821(d)(2)(A)(i) means the rights of the savings and loan that "existed prior to receivership," *i.e.*, under state law. Slip op. at 6-7. The RTC's repudiation power under Section 1821(e)(1) extends only to "any contract or lease . . . *to which such institution is a party*." Accordingly, under *O'Melveny*, the language of Section 1821(e)(1) means that the repudiation power extends only to an obligation that, "*prior to receivership*," would be considered under applicable principles of state law to be imposed on the savings and loan by contract or lease. Slip op. at 6-7. Here, New York law plainly provides

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is analogous to a conservator. The Chapter 11 trustee eventually may be replaced by a Chapter 7 trustee, which is analogous to a receiver. *Id.* at *10.

that statutory tenancy obligations are *not* imposed by contract or lease, but rather by statute and regulation. See Pet. at 20-22.

Second, *O'Melveny* holds that "matters left unaddressed [by FIRREA] are presumably left subject to the disposition provided by state law." Slip op. at 6. Although FIRREA contains numerous definitions of words used in the statute, see 12 U.S.C. § 1813, FIRREA has left unaddressed what constitutes a "contract or lease." Under *O'Melveny*, state law therefore governs what is a "contract or lease." Contrary to *O'Melveny*, the Second Circuit did what Congress chose not to do—create a federal law definition for "contract or lease." See Pet. App. 13a.

Finally, and perhaps most fundamentally, *O'Melveny* rejected the government's argument that its desire for "more money" constitutes an interest that should influence judicial interpretation of the FDIC's or the RTC's powers. Slip op. at 9. Specifically, the Court held that "neither FIRREA nor the prior law sets forth any anticipated level for the [insurance] fund" and that "there is no federal policy that the fund should always win." *Id.* In contrast, the Second Circuit adopted RTC's "more money" arguments and expressly premised its interpretation of RTC's powers on its stated desire "to strengthen RTC's hand in remedying a national economic emergency." Pet. App. 23a.

Along with the reasons set forth in the petition, the conflicts between the Second Circuit's decision and this Court's decisions in *BFP* and *O'Melveny* warrant this Court's review. In the alternative, the petition should be granted, the decision below vacated, and the case remanded for reconsideration in light of *BFP* and *O'Melveny*. Certainly, *BFP* and *O'Melveny* might well affect the Second Circuit's interpretation and therefore these decisions should be addressed by that court before 93-year old Lillian Solomon, the other petitioners, and nu-

merous other rent-controlled tenants are irrevocably evicted from their homes.

Respectfully submitted,

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RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Nos. 93-1748, 93-1757

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

LILLIAN SOLOMON, et al.,

Petitioners,

v.

RESOLUTION TRUST CORPORATION
as Receiver for Nassau Savings and
Loan Association, F.A.,

Respondent.

SUSAN SOLOMON PATTULLO, et al.,

Petitioners,

v.

RESOLUTION TRUST CORPORATION
as Receiver for Nassau Savings and
Loan Association, F.A.,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF LEGAL SERVICES FOR NEW YORK CITY, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

With written consent of petitioners and respondent, filed concurrently herewith, Legal Services for New York City Housing Task Force, together with the Legal Aid Society, Northern Manhattan Improvement Corporation, The Association for Neighborhood and Housing Development, Neighborhood Initiatives Development Corporation, The West Side SRO Law Project, The Community Service Society of New York, Inc., Metropolitan Council on Housing, New York State Tenant & Neighborhood Coalition Inc., Center for Constitutional Rights, The City-Wide Task Force on Housing Court, Inc., and Community Training and

Resource Center, Inc., submit this brief as *Amici Curiae* in support of the Petitions of Lillian Solomon, et al. and Susan Solomon Pattullo, et al. for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

INTEREST OF *AMICI CURIAE*

Amici here are all legal services and other public interest groups that have grave concerns regarding the potentially far-reaching and adverse practical effects of the Second Circuit's decision below. Specifically, under the Second Circuit's overly broad interpretation of 12 U.S.C. § 1821(e) ("Section 1821(e)"), *Amici* fear that *all* rent-regulated tenants nationwide will be placed at risk of future repudiation and eviction. *Amici* are especially concerned for rent-regulated tenants of low and moderate means who are not protected under the Second Circuit's decision.

The Legal Services for New York City (LSNY) Housing Task Force is composed of attorneys and advocates from seventeen neighborhood-based legal services offices which provide free legal services to low-income tenants faced with eviction in New York City Housing Court. It is dedicated to the protection of the constitutional and statutory rights of low-income tenants and thus is concerned with the outcome of this case.

The Legal Aid Society is one of the oldest and largest providers of legal assistance to the poor in the United States. The Society is counsel in numerous class-action cases concerning the rights of tenants and homeless families in New York City. Accordingly, the Society has a substantial interest in this case.

Northern Manhattan Improvement Corporation (NMIC) provides free legal services in housing matters to residents of the Washington Heights and Inwood neighborhoods of New York City. Ninety-five percent of NMIC's clients live in rent-regulated housing, and a number of buildings in the communities served by NMIC have been taken over by Resolution Trust Corporation ("RTC"). NMIC is therefore concerned with the impact of RTC takeovers on rent-regulated housing.

The Association for Neighborhood and Housing Development (ANHD) is a membership organization of seventy-five not-for-profit neighborhood-based organizations which preserve and

protect housing for low-income people in New York City. ANHD is concerned with the threat to housing affordability posed by the decision in this case.

Neighborhood Initiatives Development Corporation (NIDC) is a non-profit community organization which works with tenants, co-op shareholders, and property owners to improve housing conditions and maintain a stable neighborhood in the area encompassed by Bronx Community Board #11 in New York City. Several years ago, there was a wave of co-op conversions in this community. A number of those co-ops are now in default. One four-building complex consisting of over 300 units has been taken over by RTC. This complex has tremendous financial problems and would be a prime candidate for tenant evictions if RTC were to consider only the financial health of the building and the interest of the government in recouping lost investments. Therefore, RTC's right to evict tenants as a result of the Second Circuit's opinion in this case causes NIDC great concern.

The West Side SRO Law Project was founded by the City of New York in 1981 to preserve both single-room occupancy (SRO) apartments and SRO tenancies, and to advocate for law and policy which would enhance these efforts. The integrity of the rent regulation system is vital to the organization's efforts, and, accordingly, the Law Project has a significant interest in the issues and outcome of this case.

The Community Service Society of New York, Inc., works cooperatively with community-based organizations and other social policy and advocacy groups to fight poverty through research, advocacy, community development, and direct service. Through its activities, the Society has promoted and increased the affordable housing stock for poor and homeless families in New York City and has used legal intervention to protect the rights of poor tenants in the City. The Second Circuit's decision below could damage the overall efforts and goals of the Society. Thus, the organization has a significant interest in the outcome of this case.

Metropolitan Council on Housing is a New York City-wide tenant organization dedicated to decent, affordable, and integrated housing. Because the tenant rights for which Metropolitan Council advocates would clearly be threatened if federal agencies were

able to pre-empt state laws that secure those rights, it has a significant interest in the disposition of this case.

The New York State Tenant and Neighborhood Coalition Inc. (NYSTNC), is a state-wide tenant rights lobbying and advocacy membership organization. The organization lobbies the New York State legislature on laws affecting tenants' rights and protections, the allocation of funds for the production of affordable housing, and the preservation of existing housing. NYSTNC therefore has a substantial interest in this case.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the Constitution of the United States and the Universal Declaration of Human Rights. In more than two decades since its founding, CCR has participated, either directly or as *amicus*, in a number of cases involving housing issues. CCR is seriously concerned with the long-range impact of the Second Circuit's decision below, and thus has a significant interest in the disposition of this case.

The City-Wide Task Force on Housing Court, Inc., formed in 1981, is a not-for-profit coalition of community organizations, legal services providers and neighborhood housing advocates committed to improving the administration of justice for unrepresented litigants in New York City's housing court. In addition to providing information and referral services to thousands of unrepresented tenants each year, the Task Force monitors court operations and issues recommendations for court reform. The Task Force is concerned by the decision in this case because, if permitted to stand, such decision is certain to impact the client population served by this organization.

Community Training and Resource Center, Inc. (CTRC), founded as a not-for-profit corporation in 1982, works to improve conditions for lower income tenants and neighborhoods in New York City. Specifically, CTRC organizes neighborhood housing groups into city-wide coalitions that advocate for budgetary and policy reforms that benefit lower income New York City renters. CTRC is concerned with the ultimate resolution of this case because it will have a profound effect on the constituents served by CTRC.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SETTLED STATE LAW MAY BE DISREGARDED IN DECIDING WHETHER STATUTORY TENANCIES ARE SUBJECT TO REPUDIATION UNDER 12 U.S.C. § 1821(e)

The question presented by the Petitions in this case is whether RTC's authorization to "disaffirm or repudiate any contract or lease" that it, in its discretion, "determines to be burdensome," pursuant to Section 1821(e) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), includes the power to repudiate statutory tenancies created and continued by virtue of state and local law.

In the decision below, the Second Circuit held that repudiation of statutory tenancies was expressly authorized by Section 1821(e). *See RTC v. Diamond*, 18 F.3d 111, 121-22 (2d Cir. 1994). Finding that "the definition of the phrase 'contract or lease' is a matter of federal law," *id.* at 118, the court concluded "that New York's statutory tenancies -- whether under rent stabilization or rent control -- are contract-based leaseholds" and thus "fall within the express language of § 1821(e)." *Id.* at 121. In so holding, the Second Circuit completely ignored a long and unbroken line of authority clearly establishing that, as a matter of New York law, the obligations created by statutory tenancies are *not* contractual in nature and, in fact, cannot even be altered by contract, lease, or agreement.[1]

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[1] *See, e.g., Whitmarsh v. Farnell*, 83 N.E.2d 543 (N.Y. 1949); *Stern v. Equitable Trust Co.*, 144 N.E. 578 (N.Y. 1924); *De Santis v. White Rose Assocs.*, 578 N.Y.S.2d 363 (Sup. Ct. 1991); *Park Summit Realty Corp. v. Frank*, 434 N.Y.S.2d 73 (App. Term 1980), *aff'd*, 448 N.Y.S.2d 414 (App. Div. 1981), *aff'd*, 439 N.E.2d 358 (1982); *Charlotte Realty Co. v. Lubarsky*, 509 N.Y.S.2d 691 (App. Term 1986). Although the Second Circuit purported to "defer to state court's pronouncements regarding the definition of property interests," *RTC*, 18 F.3d at 118, it did not in fact do so. None of the New York cases cited by the court conflict with, nor even bear upon, the settled New York holdings that statutory tenancies are not contractual in nature. *See id.* at 120.

Because its decision to disregard state law: (i) is inconsistent with the decisional law of this Court; and (ii) creates conflicts among the circuit courts regarding the interpretation of similar statutory provisions, this Court's review of the Second Circuit's decision is plainly warranted.

A. The Second Circuit's Decision Conflicts With This Court's Well-Settled Principles Of Statutory Construction

This Court has repeatedly held that, in interpreting federal legislation, there is a strong presumption against the preemption of state and common law. *United States v. Texas*, 113 S. Ct. 1631, 1634 (1993); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This is especially true where the historic police powers of the states are implicated. *See, e.g., Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992).[2] In addition, the Court has held that longstanding concepts of state law should be utilized whenever possible to define terms and fill interstices in federal legislation. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 101-08 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 739-40 (1979); *Butner v. United States*, 440 U.S. 48, 54 (1979); *RFC v. Beaver County*, 328 U.S. 204, 210 (1946).

These well-established principles were recently reaffirmed by the Court in *BFP v. RTC*, 114 S. Ct. 1757 (1994). There, in the context of interpreting Section 548 of the Bankruptcy Code, 11 U.S.C. § 548, the Court expressly refused to attach any special "federal law" meaning to the phrase "reasonably equivalent value." In so holding, the Court noted:

> It is beyond question that an essential state interest is at issue here: we have said that "the general welfare of

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[2] It is beyond cavil that local regulation of the landlord-tenant relationship, including the adoption of rent control ordinances, is within the traditional police powers of the states. *See, e.g., Yee v. City of Escondido*, 112 S. Ct. 1522, 1529 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 12 & n.6 (1988); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *Bowles v. Willingham*, 321 U.S. 503, 517-18 (1944); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 245 (1922); *Block v. Hirsh*, 256 U.S. 135, 155-57 (1921).

> society is involved in the security of titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government." *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911). Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: the title of every piece of realty purchased at foreclosure would be under a federally created cloud. . . . To displace traditional State regulation in such a manner, the federal statutory purpose must be "clear and manifest," *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). *Cf. Gregory v. Ashcroft*, [111 S. Ct. 2395, 2401 (1991)]. Otherwise the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law. *See Kelly* [*v. Robinson*, 479 U.S. 36, 49 (1986)]; *Butner v. United States*, 440 U.S. 48, 54-55 (1979); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 171 (1946) (Frankfurter, J., concurring).

Id. at 1764-65. "[A]bsent clearer textual guidance," the Court would not presume that Congress intended to create an exception to longstanding principles of state regulation touching on the essential sovereign interest in the security and interest in title to land. *Id.*

Similarly, in *O'Melveny & Myers v. FDIC*, 62 U.S.L.W. 4487 (U.S. June 13, 1994), a recent case in which this Court was called upon to interpret a provision of FIRREA, the Court expressly noted that "matters left unaddressed [by FIRREA] are presumably left subject to the disposition provided by state law." *Id.* at 4489. Although FIRREA contains numerous definitions, *see* 12 U.S.C. § 1813, the statutory scheme has "left unaddressed" what constitutes a "contract or lease." Thus, the Court's decision in *O'Melveny* also confirms that state law should supply the definition of the terms "contract or lease."[3]

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[3] The Court in *O'Melveny* also specifically rejected the notion that "more money" arguments made by government agencies should inform a judicial interpretation of the FDIC's or RTC's powers. In the case below, however, the

(continued...)

The Second Circuit's decision to ignore New York state law in construing Section 1821(e) cannot be reconciled with these precedents. Indeed, because the decision below squarely conflicts with the principles espoused in two of the Court's most recent decisions (*BFP* and *O'Melveny*), certiorari should be granted, the Second Circuit's decision vacated, and the case remanded for this reason alone.

B. The Second Circuit's Decision Creates Interpretational Conflicts Among The Circuit Courts

The decision of the Court of Appeals below also conflicts with a number of circuit court opinions that faithfully have applied this Court's jurisprudence in interpreting statutory provisions similar to Section 1821(e).

At least two circuit courts have held that state law should determine what legal interests fall within the terms "contract" or "lease" under the repudiation provision of Section 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a). *See In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989). Moreover, two other federal courts of appeal have squarely held that obligations created by state and local rent control ordinances and housing laws are *not* obligations imposed by the words "contract" or "lease" within the meaning of the federal Bankruptcy Code. *See In re Chicago, Rock Island & Pac. R.R.*, 772 F.2d 299, 302-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Saravia v. 1736 18th St., N.W., Ltd.*, 844 F.2d 823, 827 (D.C. Cir. 1988).[4]

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[3](...continued)

Second Circuit expressly adopted RTC's "more money" arguments, and stated that its interpretation of RTC's powers was designed "to strengthen RTC's hand in remedying a national economic emergency." *RTC*, 18 F.3d at 123.

[4] *See also In re Friarton Estates Corp.*, 65 B.R. 586, 592-93 (Bankr. S.D.N.Y. 1986) (utilizing state law to determine that a New York statutory tenancy is not a "contract" or a "lease" within the meaning of Section 365(a) of The Bankruptcy Code, 11 U.S.C. § 365(a)). The Second Circuit's attempt to distinguish *Friarton* on the basis of the Bankruptcy Code's allowance for the "renewal or extension" of leases in accordance with "applicable non-bankruptcy law," *RTC*, 18 F.3d at 122, ignores the *Friarton* court's specific and expres

(continued...)

These decisions obviously conflict with the Second Circuit's decision in this case which opted to create a "federal law" definition of "contract" or "lease" which included statutory tenancies.

The decision below also conflicts with the decisions of two other federal circuit courts holding that the term "agreement" -- a virtually indistinguishable and similarly undefined statutory term found in FIRREA -- does not include obligations imposed by state law on parties to a relationship initiated by contract. *See Bateman v. FDIC*, 970 F.2d 924, 928 (1st Cir. 1992); *Patterson v. FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1990).

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE SECOND CIRCUIT'S CONSTRUCTION OF 12 U.S.C. § 1821(e) IS PERMISSIBLE IN LIGHT OF THE SERIOUS CONSTITUTIONAL ISSUES THAT SUCH CONSTRUCTION RAISES UNDER THE TAKINGS CLAUSE

It is a "familiar principle" of this Court's jurisprudence that federal courts should "not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which the constitutional question can be avoided." *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2465 (1993) (citing *United States v. Locke*, 471 U.S. 84, 92 (1985)). Thus, where, as here, there is substantial doubt as to whether respondent's requested interpretation of Section 1821(e) comports with the Takings Clause of the Fifth Amendment, the Second Circuit should have declined "'to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive [constitutional] questions.'" *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979)). The Second Circuit's failure to adhere to this settled principle of statutory construction, by simply declaring

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[4](...continued)

reliance on state law in examining whether statutory tenancies are within the meaning of "contract" or "lease."

statutory tenancies outside the scope of Section 1821(e), warrants this Court's review.[5]

A. Statutory Tenancies Are Protectable Property Interests

The Second Circuit briefly considered, and then summarily rejected, petitioners' argument that repudiation of statutory tenancies would constitute a taking without just compensation in violation of the Fifth Amendment of the Constitution. Specifically, the court held that because each of the tenant petitioners had the option of remaining in possession of their respective apartments "through the end of the tenancy's term . . .[,] nothing is being 'taken.'" *RTC v. Diamond*, 18 F.3d 111, 125 (2d Cir. 1994).[6] A state-created interest in a statutory tenancy, however, is clearly a protectable property interest for as long as possession is authorized by state law (regardless of the tenancy term set forth in any written lease). Accordingly, the Second Circuit's holding on the constitutional "takings" issue does not withstand scrutiny.

It is well-settled that tenancy interests are property interests protected by the Fifth Amendment. *See, e.g., Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976); *United States v.*

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[5] While *Amici* recognize that a number of lower courts have specifically upheld Section 1821(e) against attacks under the Takings Clause, all of these cases involved the repudiation of actual contracts; none dealt with the repudiation of a statutorily created property interest. *See Unisys Finance Corp. v. RTC*, 979 F.2d 609 (7th Cir. 1992); *Atlantic Mechanical, Inc. v. RTC*, No. 91-1500, 1992 U.S. App. LEXIS 904 (4th Cir. Jan. 27, 1992); *Fleet Nat'l Bank v. FDIC*, 843 F. Supp. 787 (D. Mass. 1994); *Pageland 29 Ltd. v. FDIC*, No. 91-1858-LFO, 1992 U.S. Dist. LEXIS 19231 (D.D.C. Dec. 14, 1992); *LB Credit Corp. v. RTC*, 796 F. Supp. 358 (N.D. Ill. 1992); *FDIC v. Cobblestone Corp.*, No. 91-12741-Z, 1992 U.S. Dist. LEXIS 17024 (D. Mass. Oct. 28, 1992). While a simple breach of contract may not rise to the level of an unconstitutional taking, the elimination of a statutorily created tenancy interest in real property surely does.

[6] The Second Circuit also held that repudiation of statutory tenancies could not constitute an unconstitutional "taking" because such repudiations were "expressly authorize[d]" by Section 1821(e). *RTC*, 18 F.3d at 125. It is hornbook law, however, that an activity that is otherwise unconstitutional does not suddenly become constitutional merely because it is authorized by statute. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("[i]t is clear, of course, that no act of Congress can authorize a violation of the Constitution").

Petty Motor Co., 327 U.S. 372, 373 (1946); *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924).[7] The nature of the property interest, and its duration, is determined according to the terms of any lease that may exist between the landlord and the tenant, *as well as by the provisions of state law*. *See Petty Motor Co.*, 327 U.S. at 376 (where lease had automatic termination provision, and "*in the absence of a contrary state rule*," tenant had no right which persisted beyond the taking and thus was entitled to no compensation) (emphasis added); *Berrios v. City of Lancaster*, 798 F. Supp. 1153, 1157 (E.D. Pa. 1992) ("[a] leasehold interest . . . is a property interest under Pennsylvania law, as . . . defined and created by . . . the terms of the lease contract, *and the Pennsylvania Landlord and Tenant Act of 1951*") (emphasis added) (citations omitted). Thus, even where a lease would have expired under its own terms, or would otherwise have been terminated, the tenancy remains a compensable property interest for as long as continued possession would be permitted under state law. *See, e.g., Petty Motor Co.*, 327 U.S. at 380 (in the case of tenancies at will, determination of the remainder of the term will depend upon the requirements of state law as to notice for termination of such tenancies).

Thus, New York, through its local rent control and rent stabilization ordinances, has clearly created a compensable property interest of indefinite duration.[8] As long as the conditions

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[7] *Accord Ward v. Downtown Dev. Auth.*, 786 F.2d 1526, 1529 (11th Cir. 1986) ("any tenancy, no matter the duration, is a property interest that can be the subject of a compensable taking"); *Devines v. Maier*, 665 F.2d 138, 141 (7th Cir. 1981) ("leasehold interests are property interests protected by the Fifth Amendment"); *Berrios v. City of Lancaster*, 798 F. Supp. 1153, 1157 (E.D. Pa. 1992) (leasehold interests are property interests that cannot be taken without just compensation).

[8] The property interest created by state and local law is conditioned on a number of factors, primarily: (i) the tenant's continuing payment of the legally prescribed rent; and (ii) the local legislature's continuing determination that a local housing emergency exists. Otherwise, tenants of rent-controlled and rent-stabilized apartments are only subject to eviction on grounds specifically set forth in the rent regulation laws, such as, among other things, a breach of a substantial obligation of the tenancy, commission of a nuisance, illegal occupancy, or refusal

(continued...)

set forth in New York's statutory scheme are met, the rent-controlled or rent-stabilized tenant may not be evicted, and his or her right to possession of, and therefore his or her property interest in, the statutory tenancy continues. *Cf. McCue Bros. & Drummond, Inc. v. Commissioner*, 19 T.C. 667, 671 (1953) ("[i]n view of the numerous authorities examined, including the cases cited, we are convinced that the statutory right of possession, use, and occupancy which the petitioner had in the store premises under the emergency laws was a property right. . . . This right petitioner held first under the lease and later under the emergency rent control statute"), *aff'd*, 210 F.2d 752 (2d Cir.), *cert. denied*, 348 U.S. 829 (1954).[9]

B. Repudiation Of Statutory Tenancies Without Just Compensation Would Constitute An Unconstitutional Per Se Physical Taking Of Petitioners' Property Interests

Cases interpreting the Takings Clause of the Fifth Amendment generally fall within two distinct classes -- those involving physical takings and those involving regulatory takings. "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *accord Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Such physical occupations by the

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[8](...continued)

to provide reasonable access. *See generally* N.Y.C. Admin. Code § 26-408, reported following N.Y. Unconsol. Law § 8617 (McKinney 1987); N.Y.C. Admin. Code § 26-511 and NYCRR Part 2524. Because a property interest created by state and local law is, from its inception, conditioned upon the continuing "consent" of the legislature, revocation of such "consent" could not, of course, itself constitute a taking.

[9] Similar property interests created by state law have routinely been deemed protected by the Takings Clause of the Fifth and Fourteenth Amendments. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 46 (1960) (materialman's lien which attached by virtue of state law constituted a compensable property interest protected by the Fifth Amendment); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (secured interest in mortgaged property under state law could not be "taken even for a wholly public use without just compensation").

government have come to be recognized as "*per se*" physical takings "for which compensation *must* be paid." *FCC v. Florida Power Corp.*, 480 U.S. 245, 250 (1987) (emphasis added).

The Second Circuit's decision below interpreting Section 1821(e) of FIRREA to permit the eviction of rent-regulated tenants from their statutory tenancies constitutes a classic example of a *per se* physical taking. The government, through respondent here, is not only compelling petitioners to accede to a physical occupation of their apartments, but is actually seeking to eliminate, through eviction, the totality of petitioners' state-created property interests in the rental units. Where, as here, "the Government actually [takes] the leaseholds of the tenants . . . or . . . destroy[s] the tenants' right of occupancy," there is "a complete taking of the entire interest of the tenants in the property" and compensation is required. *Petty Motor Co.*, 327 U.S. at 378; *see also Devines*, 665 F.2d at 142 ("the tenant whose right to occupy the premises is extinguished has nothing left and the impact of the regulation on his rights could not be more severe").

C. At The Very Least, Repudiation Of Statutory Tenancies Without Just Compensation Would Constitute An Impermissible Regulatory Taking Of Petitioners' Property Interests

The second class of "takings" recognized by this Court's jurisprudence are generally termed "regulatory takings." Unlike physical takings, not every regulation of property rises to the level of an unconstitutional taking. Rather, "where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee*, 112 S. Ct. at 1526 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978)).

While the Court has "eschewed the development of any set formula," it has "identified three factors which [it deems to] have 'particular significance'" in evaluating whether governmental regulation of property constitutes a "taking." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986). These are:

"(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Id.* at 224-25 (quoting *Penn Cent.*, 438 U.S. at 124). Here, each of these three factors supports the conclusion that eviction from statutory tenancies constitutes an unconstitutional "taking" without just compensation.

First, the economic impact of the Second Circuit's decision on petitioners will obviously be substantial. Not only will petitioners have to bear significant costs as a result of their forced removal and relocation from their current apartments; petitioners must seek alternative rental housing in a New York City housing market that has again recently been found by the local legislature to be in a continuing "state of emergency."[10] Moreover, to the extent the Second Circuit's decision is ultimately applied to low-income and moderate-income rent-controlled tenants (as discussed *infra*), repudiation and eviction pursuant to Section 1821(e) could have an economically and socially devastating impact on thousands of tenants not only in New York City, but nationwide. *Cf. Pennell v. City of San Jose*, 485 U.S. 1, 14 n.8 (1988) ("[p]articularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe").

Second, the repudiation of petitioners' statutory tenancies interferes greatly with their "investment-backed expectations." One need look no further than the factual illustration provided in Lillian Solomon's Petition for Certiorari in this case to see that this is so. In declining to purchase cooperative shares relating to her unit when her building's owner converted the apartments to cooperative ownership in 1983, Mrs. Solomon, who is now over 90 years old, specifically relied on the representation made to her pursuant to New York law that her rights as a protected tenant would remain undisturbed. *See* Petition for a Writ of Certiorari at 6, *Solomon v. RTC*, (May 4, 1994). Mrs. Solomon's reliance on her expectation of continued occupancy rights in accordance

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[10] *See* McKinney's *Session Laws*, L. 1993, c. 253 (declaring an emergency in housing in certain parts of the state, readopting the rent regulatory enabling laws, and extending them to June 15, 1997).

with New York's state and local law, in deciding not to invest money to buy cooperative shares, is precisely the type of state law reliance interest that this Court has routinely sought to protect.[11]

Finally, there can be no doubt that the character of the governmental action here weighs heavily in favor of a finding that the federal government, through RTC, is effecting an unconstitutional "taking" of private property interests without just compensation. Specifically, under the Second Circuit's and RTC's interpretation of Section 1821(e), one particular group of citizens (namely, those citizens who occupy rent-regulated housing) is being asked to bear public burdens (namely, the forfeiture of valuable property interests in their homes to help mitigate the adverse effects of a nationwide savings and loan crisis) "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In such circumstances, the requested interpretation of Section 1821(e) does not comport with the requirements of the United States Constitution, and thus should not be permitted to stand.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE SECOND CIRCUIT ERRED BY COMPLETELY OVERLOOKING THE SIGNIFICANT AND ADVERSE EFFECTS THAT ITS OVERLY BROAD RATIONALE MAY HAVE ON RENT-REGULATED TENANTS NATIONWIDE

The Second Circuit's decision holding that the repudiation of statutory tenancies is properly authorized by Section 1821(e) threatens to obliterate not only the continuing viability of New

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[11] *Cf. Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (finding reasons for adopting state law "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards"); *United States v. Brosnan*, 363 U.S. 237, 241-42 (1960) (declining to formulate a "federal law" rule governing divestiture of federal tax liens where federal legislation implicated "area of complex property relationships long since settled and regulated by state law" and where "the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures").

York's rent regulatory scheme, but also the social and public policies upon which that scheme is based.

A. The Second Circuit's Decision Is Likely To Have A Significant And Broad-Based Impact On Local Rent Regulations

While this case involves only nine tenancies, under the rationale of the Second Circuit's holding, RTC could ultimately utilize Section 1821(e) to terminate tenancies in *all* rent-regulated units over which it acquires control.[12] While the precise number of rent-regulated units controlled by RTC (or FDIC) was apparently the subject of much controversy below, *see RTC v. Diamond*, 18 F.3d 111, 125 n.4 (2d Cir. 1994), the number clearly is significant and has been increasing steadily.

Should the decision below survive appeal, *Amici* would have grave concerns regarding when, where, and how RTC will exercise its newly minted and extraordinary power to repudiate statutory tenancies. Conceivably, thousands of low-income and moderate-income tenants across the country could find themselves without a home simply because RTC, in its sole discretion and "pursuant to an overarching mandate to 'maximize the net present value return' on assets in its possession," determines that their tenancies "are burdensome." *RTC*, 18 F.3d at 124.

While the Second Circuit evidenced concern for the potentially far-reaching social implications that its decision might have, in the end it found comfort in an RTC "Policy Statement" purporting to limit the agency's discretion in evicting low-income or moderate-income tenants. *RTC*, 18 F.3d at 125 n.5 ("any impact on tenants will be mitigated by RTC's express policy not to exercise its repudiation power with respect to families of low and moderate income").

However, since RTC's "Policy Statement" is simply an internally generated statement of guidelines that is not found in

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[12] As noted in Lillian Soloman's Petition, press reports indicate that RTC is already preparing to utilize the decision below to preempt rent control laws and evict tenants in Massachusetts, California, and Connecticut. *See 2nd Circuit Adds to Agency Power*, The Thrift Regulator, Mar. 14, 1994, at 3.

statute or regulation, it can be modified, revoked, or arguably even ignored at any time, and is not a meaningful constraint on RTC's discretion.[13] As the District Court in this case expressly recognized: "Since section 1821(e)(1) says nothing about income levels, if the section is interpreted to encompass the power to repudiate statutory tenancies, *the RTC would not be required to adopt the income exemptions* that it has in fact adopted in this case." *RTC v. Diamond*, 801 F. Supp. 1152, 1162 n.6 (S.D.N.Y. 1992) (emphasis added), *rev'd in relevant part*, 18 F.3d 111 (2d Cir. 1994).[14]

In other words, although the "Policy Statement" is in effect now and may for a time help mitigate the impact of the Second Circuit's holding on low-income and moderate-income tenants occupying rent-regulated housing, it is neither a guaranteed nor enforceable constraint on RTC's repudiation powers as the Second Circuit has construed them.[15] Accordingly, *Amici* submit that the Second Circuit's advertence to the "Policy Statement" as justifying its holding, is unwarranted.

B. The Decision Below Ignores Local Determinations Of Social Policy Long-Recognized As Important By This Court

This Court has long recognized that state and local rent regulatory schemes are not only a legitimate exercise of the states'

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[13] The RTC enabling statute provides for review of promulgated policy statements by a Thrift Deposit Protection Oversight Board, but nothing in the statute appears to require a similar review of any purported withdrawal or revocation of policy. *See* 12 U.S.C. §§ 1441a(a)(6)(A) & (b)(3)(B).

[14] *See also Employees' Retirement Sys. v. RTC*, 840 F. Supp. 972, 990 (S.D.N.Y. 1993) (refusing to credit RTC valuation policies because "the RTC . . . is at the controls, choosing to utilize this distorting method in those instances when its unfairness will redound to the RTC's favor and avoiding it . . . where its use would prejudice the RTC").

[15] *Amici* recognize that, pursuant to 12 U.S.C. § 1441a(b)(3)(C)(v), RTC is charged with "maximiz[ing] the preservation of the availability and affordability of residential real property for low- and moderate-income individuals." However, in light of what the Second Circuit described as RTC's "primary" and "overarching" mandate, which is to maximize recovery on assets, *see RTC*, 18 F.3d at 113, 124, this provision is apparently not sufficient to protect rent-regulated tenants from losing their homes.

historic police powers, but also that such ordinances generally serve important public and social policy interests. As the Court observed over 70 years ago:

> The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state. That such an emergency . . . would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual basis and justification, for exercise of that power.

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 245 (1922).[16] It is precisely these type of public policy concerns upon which New York's long-standing rent control and rent stabilization systems are based. *See, e.g., Morse & Grossman, Inc. v. Acker & Co.*, 79 N.E.2d 258, 260 (N.Y. 1948) ("[t]he basic purpose of the emergency rent legislation was to protect tenants by placing a ceiling on rents and by preventing widespread evictions while the emergency . . . shortage of space continued").[17]

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[16] *See also Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) ("a primary purpose of rent control is the protection of tenants"); *Bowles v. Willingham*, 321 U.S. 503, 513 n.9 (1944) (one purpose of rent control is "to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living"); *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (in enacting rent control legislation, Congress "stated the unquestionable embarrassment of Government and danger to the public health in existing condition of things. . . . Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present").

[17] *See also Suppus v. Bradley*, 105 N.Y.S.2d 48, 50 (App. Div. 1951) ("[t]he primary aim of the Act referring to housing accommodations is . . . to protect tenants from eviction at a time when because of the housing shortage it is diffi-

(continued...)

There is still an acute shortage of housing in New York City. In 1993, there were approximately 2.06 million rental units in New York City, only 70,000 of which were vacant and available for rent -- a vacancy rate of approximately 3.4%.[18] Perhaps more importantly, the vacancy rate for low-income housing (asking rents of less than $300) in 1993 was only 0.58%.[19] These vacancy rates are considerably less than the 5% rate that the legislature has deemed to constitute a "housing emergency." New York's rent control and rent stabilization systems are part of a comprehensive legislative effort to deal with this "housing emergency."[20] The decision below threatens seriously to hinder this effort.

* * *

In sum, in evaluating the Petitions for Certiorari in this case, *Amici* respectfully request the Court to take into consideration the potentially enormous impact that the Second Circuit's decision might have on local housing markets generally, and on tenants of low and moderate means in particular. The public's interest in safe, affordable, and decent housing -- especially in areas where local legislatures have declared housing emergencies -- is too important a social policy to leave to the virtually unguided whim of federal agencies charged primarily with "maximizing" the value of government assets.

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[17](...continued)

cult, if not impossible, for them to get another place to live"); *Koppel v. Evelyn*, 145 N.Y.S.2d 213, 215 (City Mun. Ct. 1955) ("[t]he purpose and intent of the Emergency Rent Statute . . . is twofold; the protection of the occupancy of tenants in their housing accommodations and the control of the rent that may be charged and collected").

[18] *See Selected Findings of the 1993 Housing and Vacancy Survey*, prepared by Assistant Commissioner for Policy Analysis and Research, New York City Department of Housing Preservation and Development (Feb. 8, 1994) (hereinafter "*Selected Findings*").

[19] *See id.*

[20] Exacerbating the "housing emergency" and further highlighting the continuing need for rent regulation is the fact that real incomes of New York City tenants are on the decline. The median income of renters in New York City decreased 5% between 1990 and 1992 and now rests at $19,005. *See Selected Findings*. The proportion of renter households with incomes below the poverty level increased from 26.8% in 1990 to 29.9% in 1992. *See id.*

CONCLUSION

The decision of the Court of Appeals in this case completely ignored well-settled principles of statutory construction to the potential detriment not only of petitioners, but of thousands of rent-controlled tenants in New York City and across the country. In order to correct these errors, and to resolve the decisional conflicts that the Second Circuit's opinion creates, the writ should issue.

Dated: June, 1994

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No. 93-1748

In the Supreme Court of the United States

OCTOBER TERM, 1993

LILLIAN SOLOMON, ET AL.,
PETITIONERS,
v.
RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.,
RESPONDENT.

(5)

No. 93-1757

SUSAN SOLOMON PATTULLO, ET AL.,
PETITIONERS,
v.
RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.,
RESPONDENT.

PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

BRIEF OF THE AMICUS CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI.

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I. INTEREST OF THE AMICUS CURIAE.

This brief of the Amicus Curiae is filed on behalf of the City of Boston in support of Petitions for a Writ of Certiorari.[1] The City of Boston ["Boston"] has enacted a Rent Equity Ordinance, Chapter X of the City Code ["Boston Ordinance"] which differs in many material respects from the New York rent regulatory statutes. (A-1-64). However, the Second Circuit Court of Appeals decision in this case has been, and continues to be, erroneously cited as precedent in the Massachusetts courts. As a practical matter, the Resolution Trust Corporation ["RTC"] and the Federal Deposit Insurance Corporation ["FDIC"], in misplaced reliance on the Second Circuit decision in this case, are operating in Boston with no regard for the Boston Ordinance.

Like the City of New York, Boston experienced massive foreclosures in its real estate market in 1990 through 1991. This was followed, in some instances, by a number of bank and savings and loan failures resulting in the acquisition of many properties by RTC and FDIC. In connection with these "takeovers", Boston has witnessed several instances of an aggressive eviction policy exercised by both RTC and FDIC regarding individuals residing in their properties; individuals who are protected by the eviction provisions of the Boston Ordinance. In each instance, both RTC and FDIC have taken the position that the provisions of the Boston Ordinance are federally preempted by the Financial Institutional Reform, Recovery and Enforcement Act of 1989 ["FIRREA"], 12 U.S.C. §§ 1441, *et seq.*, particularly those provisions of the Boston Ordinance regulating evictions. The result has been an eruption of litigation between Boston and the RTC and FDIC in both the Federal and State Courts. Still other attempted evictions by RTC and FDIC, which apparently have stopped short of litigation, have been brought to Boston's attention by tenant advocates. (A-83-84).

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[1] *Resolution Trust Corp.* v. *Diamond*, 18 F.3d 111 (2d Cir. 1994) *petitions for cert. filed sub nom.*, *Pattullo* v. *Resolution Trust Corp.*, (U.S. May 4, 1994) (No. 93-1757), *Solomon* v. *Resolution Trust Corp.*, (U.S. May 4, 1994) (No. 93-1748).

According to the Tenant/Petitioners' brief (at p. 12), RTC and FDIC intend to utilize the Second Circuit decision to accelerate their evictions of rent and eviction protected tenants in states such as Massachusetts. Therefore, Boston anticipates that litigation with RTC and FDIC will continue to escalate on this issue.

In Massachusetts, rent control is enacted after the state legislature has declared a housing emergency in a particular city and passes special legislation empowering that city to exercise its police power to impose rent and eviction restrictions in order to alleviate the emergency. The special legislation for Boston was first enacted in 1969 upon the declaration "[T]hat a serious public emergency exists with respect to the housing of a substantial number of the citizens in the City of Boston. . . .". 1969 Mass. Acts, c. 797. (A-68). *Cf.* 1970 Mass. Acts, c. 863 and 1987 Mass. Acts, c. 45. (A-69-79). The preamble to the Ordinance enacted in 1984 as c. 34 (A-65-67) echoes this concern in stating that "A serious public emergency exists with respect to the housing of a substantial number of residents of the City of Boston, *particularly those who are elderly, handicapped and who have low or moderate annual incomes.*" (Emphasis added).

Although the Boston Ordinance differs from the New York rent regulatory statutes, the Second Circuit Court of Appeals decision in this case is being cited inappropriately in the Massachusetts courts by the RTC and FDIC in Boston as precedent, to the detriment of the class of persons the Boston Ordinance seeks to protect. Therefore, pursuant to Rule 37.5 of the Rules of this Court, the City of Boston hereby submits its brief as an amicus to this Court in support of the petitioners' requests for review by way of writ of certiorari.

II. REASONS FOR GRANTING THE WRIT.

The petitioners seek a review of the Second Circuit's decision in *Resolution Trust Corp.* v. *Diamond*, 18 F.3d 111 (2d Cir. 1994). The Second Circuit held, *inter alia*, that statutory obligations created by New York's eviction laws are grounded in "contract" or "lease" and, therefore, fall within the express language of FIRREA, 12 U.S.C. §§ 1441, *et seq.*, and its grant to RTC of the power to repudiate contracts or leases. *Diamond*, 18 F.3d at 120.

This case presents several grounds for granting review on a writ of certiorari under Supreme Court Rule 10.1. The decision of the Second Circuit conflicts with decisions of the court of last resort for the State of New York and is contrary to the law of contract and statutory tenancies in the other states, including Massachusetts. Moreover, the Second Circuit's decision conflicts with decisions of other United States Courts of Appeal as well as recent decisions of this Court, the resolution of which can only be accomplished by further review by this Court.

(A) THIS DECISION CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL.

The *Diamond* Court, in creating a new federal definition of contract and lease, generated discord among certain United States Courts of Appeal regarding whether state or federal substantive law should be applied when interpreting the terms "agreement", "contract" and "lease" as contained in the provisions of FIRREA. *Diamond*, 18 F.3d at 117. The Fifth Circuit, in *Patterson* v. *FDIC*, 918 F.2d 540, 544 (5th Cir. 1990), held that FDIC, pursuant to 12 U.S.C. § 1823, could not avoid a claim of Texas' statutory homestead because, in applying state

state case law, a statutory homestead did not constitute an "agreement". Similarly, the United States Court of Appeals for the First Circuit in *Bateman* v. *FDIC*, 970 F.2d 924, 927 (1st Cir. 1992), applied state law in determining that a mechanics lien created by virtue of a Maine statute was not an "agreement" within the meaning of FIRREA. By contrast, the *Diamond* Court wholly ignored the entire body of New York contract and statutory tenancy law when it incorporated statutory obligations within the rubric of a new definition of "contract" under federal law.

(B) THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH DECISIONS OF THE COURT OF LAST RESORT FOR NEW YORK.

The decision that statutory obligations are grounded in the laws of contract and/or lease and thereby fall within RTC's power to repudiate statutory tenancies, conflicts with the settled case law of the court of last resort for the State of New York. The *Diamond* Court reasoned that, because it found that repudiation of such tenancies is within the scope of the express statutory grant of power to RTC in FIRREA, 12 U.S.C. § 1821(e), it was not necessary to reach the question of the possible "conflict preemption" of state law. *Diamond* at 125. The court was able to reach this conclusion only by redefining "leases" and "contracts" to encompass the statutory obligations created and maintained solely by virtue of New York rent control, rent stabilization and condominium/cooperative conversion protective laws. *Diamond*, 18 F.3d at 125.

New York appellate courts have long held that a contractual relationship between landlord and tenant is not a prerequisite to the application of rent control. In *Stern* v. *Equitable Trust Co.*, 238 N.Y. 267, 269-70; 144 N.E. 578 (1924) the New York Court of Appeals held:

> The tenant thus remains in possession, not by virtue of any agreement, express or implied, either as to duration of term or amount of rent, but by virtue of the compulsion which the law exerts on the landlord to allow him to remain.

See also, Whitmarsh v. *Farnell*, 298 N.Y. 336; 83 N.E.2d 543, 78 N.Y.S.2d 782 (1949); *DeSantis* v. *White Rose Associates*, 152 Misc.2d 567 (Sup. Ct. N.Y. Co. 1991).

The result of the Second Circuit's holding is the erroneous establishment of two conflicting standards in New York between the state and federal courts regarding statutory tenancies. This conflict should be resolved by this Court.

(C) THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH DECISIONS OF THE COURTS OF LAST RESORT FOR THE COMMONWEALTH OF MASSACHUSETTS AND OTHER STATES.

Under Massachusetts law, "statutory tenancies" are viewed, as they are in New York, as wholly independent of the common law definitions of lease and contract. In a recent case before the Supreme Judicial Court for the Commonwealth of Massachusetts, a foreclosing bank made an argument based on contract law similar to RTC's position in this case, *i.e.*, that foreclosure, in terminating a tenant's common law status, also terminates all statutorily created rights afforded the tenant under the Boston Ordinance. The Court summarily rejected the bank's argument and noted:

> Dime relies on several common law propositions that we conclude are not dispositive of the issue. Dime has no contractual relationship with the tenants of its former mortgagors. Dime has neither demanded

> nor accepted any rent from the occupants of the premises and has refused to enter into a landlord-tenant relationship with them. In short, Dime argues that, because there is no landlord-tenant relationship, (a) the occupants have no contractual rights against it, (b) no occupant of such premises is a tenant, and (c) there is no rental agreement that is subject to Boston's rent control law. None of these points, even if correct, is controlling in deciding whether Boston's rent control law requires Dime to obtain a certificate of eviction before seeking to evict such occupants.

Boston Rent Equity Bd. v. *Dime Sav. Bank of New York*, 415 Mass. 48; 611 N.E.2d 245, 247 (1993).

The *Dime* Court concluded that the language of the Boston Ordinance applied to all evictions of residents in Boston's regulated units and, therefore, that the bank was required to comply with the Boston Ordinance in seeking possession.

In Massachusetts, the restrictions imposed by state rent control laws are not defined by the law of contract but by those very enactments themselves. Whatever rights the owner may or may not have under common law are not relevant. *See, e.g., Rita* v. *Carella*, 394 Mass. 822, 827; 477 N.E.2d 1016, 1019 (1985). "Where a public emergency in housing exists, . . . any rights contained in a private contract must yield to rational legislative protection of the public interest." *Huard* v. *Forest St. Hous., Inc.*, 366 Mass. 203, 208; 316 N.E.2d 505, 507 (1974). For this reason the Massachusetts Supreme Judicial Court in both *Huard* and *Rita* held that a tenant under rent control is entitled to recover rent overcharges even though that tenant had agreed to pay higher than the legal maximum rent. Accordingly, the Appeals Court of Massachusetts ruled in *Maguire* v. *Boston Rent Equity Bd.*, 25 Mass. App. Ct. 951, 518 N.E.2d 882, 883 (1988) that where a property is subject to

rent and eviction restrictions imposed by state and local law, a subsequent owner must accept the consequences of owning the property subject to those restrictions; that a successor owner's subjective intent to enter into a landlord/tenant relationship is irrelevant to the applicability of those protections to persons living in statutorily regulated units. *See also, Flynn* v. *City of Cambridge*, 383 Mass. 152; 418 N.E.2d 335 (1985) *and compare Dime Sav. Bank*, 415 Mass. at 48; 611 N.E.2d at 245.[2]

Other state appellate courts have uniformly joined Massachusetts and New York in construing rent control laws as independent of common law principles of contract. E.g., *Gross* v. *Superior Court*, 171 Cal. App. 3d 265, 217 Cal. Rptr. 284 (1985); *Administrator of Veterans Affairs* v. *Valentine*, 490 A.2d 1165 (D.C. 1985); *Rowe* v. *Pierce*, 622 F.Supp. 1030 (D.D.C. 1985); *Merriweather* v. *D.C. Bldg. Corp.*, 494 A.2d 1276 (D.C. 1985); and *Washington Fed. Sav. & Loan Ass'n* v. *District of Columbia Rental Hous. Comm'n*, 492 A.2d 279 (D.C. 1985).[3]

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[2] Moreover in Massachusetts "[i]n the area of tenant/landlord law, unless there is an actual conflict between directives imposed by Federal and State Law, Federal Law will not displace State Law." *Cruz Management Co.* v. *Widerman*, 417 Mass. 771, 780 (1994).

[3] In *Gross* the California Court stated at 274-75 that, "If the occupant originally took lawful possession of the premises as a tenant, he remains such for the purposes of the [rent control laws] no matter what change in ownership occurs and regardless of whether under local law he is technically a tenant". In *Valentine* the District of Columbia Court of Appeals held that the Veterans Administration ["VA"] could not dispossess a tenant of a foreclosed building without complying with local rent control laws despite the VA's argument that since there was no contractual relationship between the parties, it did not have to comply with rent control. The court stated:

> We think it clear, then, that in the context [of the rent control statute] 'landlord', 'tenant' and 'rental unit' are not to be understood solely according to the technical precepts of real property law. Rather, we think they must be interpreted by reference also to their more ordinary usage and the purposes of the statute. [The statute] evinces an intent to protect from evictions persons who have been renting apartments and who continue to pay the rent.

Valentine, 490 A.2d at 1169-70.

The strain of the Second Circuit's reasoning in reading these statutory obligations as "leases" and "contracts" under FIRREA, is evidenced by the fact that the Court had to first create a lease term where none existed in New York's regulatory laws. Furthermore, in rejecting the concept of statutorily protected tenancies as defined by states such as Massachusetts which have rent control statutes, the Second Circuit failed to supply any legal support for its decision to create a new federal law of contract.

(D) THIS CASE PRESENTS IMPORTANT ISSUES OF LAW REGARDING FEDERAL PREEMPTION. THE SECOND CIRCUIT DECISION IS IN DIRECT CONFLICT WITH THE RECENT DECISIONS OF THIS COURT.

In enacting FIRREA, Congress clearly set out under which circumstances it did and did not intend preemption by the Act. *See*, 12 U.S.C. § 1821(c)(2)(c)(D) and *compare* § 1821(c)(3)(C) and (D). The *Diamond* Court, by holding that statutory tenancies are grounded in a "contract' or "lease" rather than state statute under federal law, if not state law, attempted to avoid the real issue of federal preemption of state law. *Diamond*, 18 F.3d at 121. This indirect preemption of New York state law by the Second Circuit raises several issues which have far reaching implications and which are in need of resolution by this Court.

FIRREA provides an express grant that RTC and FDIC, acting as receivers or as conservators of failed institutions, may perform certain functions. These statutory grants, however, are not all empowering so as to elevate the RTC/FDIC to the position of a "sacred cow capable of grazing upon the rights of citizens, unchecked by the courts". *Cummings Properties Management, Inc.* v. *FDIC*, 786 F.Supp. 144, 146 (D.

Mass. 1992). RTC's sweeping claims of authority are legally unsupportable especially in view of the fact that there is a very strong countervailing presumption against federal preemption of state law as illustrated by several recent decisions of this Court.

In a case just decided on May 23 of this year, this Court reaffirmed that the party arguing for the displacement of state law carries a heavy burden of showing that federal preemption was the single "clear and manifest" purpose of Congress.

> Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit." It is beyond question that an essential state interest is at issue here: we have said that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government." Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: the title of every piece of realty purchased at foreclosure would be under a federally created cloud. . . . To displace traditional State regulation in such a manner, the federal statutory purpose must be "clear and manifest. . . . [Therefore] where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation.

BFP v. *Resolution Trust Corp.*, No. 92-1370, 1994 WL 197048 at 6, 7 (U.S. May 23, 1994). (Citations omitted).

In another case decided this June 13 this Court directly addressed the question of whether, in the absence of specific definitional language in a provision of FIRREA, the Courts, in interpreting the provision, should apply state or federal common law. See *O'Melveny & Meyers* v. *FDIC*, No. 93-489 (June 13, 1994). This Court resoundingly rejected the FDIC's position that federal common law should be applied. It began its analysis by noting that under *Erie R. Co.* v. *Thompkins*, 1304 U.S. 64, 78 (1938) "There is no federal general common law" and opined that the creation of a special federal common law in order to divest states of their authority over those areas traditionally reserved to the states would be inadvisable. *O'Melveny*, No. 93-489, slip. op. at 3-4. The *O'Melveny* Court noted that where a federal statute is explicit in its displacement of state law "we of course would not contradict . . . [the] federal statutory provision." However, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny*, No. 93-489, slip. op. at page 6 (Citations omitted). In such instances to create a whole new definition of a term by federal law which contradicts the accepted common understanding of that term under state law is not a supplement but an alteration of the federal statute. *O'Melveny*, No. 93-489, slip. op. at page 7. In *Diamond*, the Second Circuit's creation of a new federal law of "contract" and "lease" where no such definitions are found within FIRREA conflicts with these holdings in *O'Melveny* and are clearly wrong.[4]

The presumption against preemption applies particularly in those cases in which the state laws deal with rent control and health and safety issues; areas especially reserved to the states

[4]Other support for the proposition that the *Diamond* Court should have looked to state law is highlighted by the *O'Melveny* interpretation of language similar to that appearing in § 1821(e) as referring back to only those "contracts" or "leases" to which the lending institution was a party, which, naturally, would have been contracts and leases as defined by state law.

as part of their traditional police powers. *See Rowe* v. *Pierce*, 622 F.Supp. 1030, 1033 (D.C. 1985). A "presumption against preemption is particularly apt when . . . the state law said to be preempted is within the traditional police powers of the state." *Rogers* v. *Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991); *see also In re: Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

In the case *sub judice*, the regulations and laws which RTC seeks to avoid through FIRREA are matters affecting both the police powers of the state and the private property rights of individuals residing in the City of New York. Where, as here, a party seeks to enforce federal law in direct contravention to state law, the power to do so should be construed very narrowly. The Second Circuit's conclusion, which permits avoidance of RTC's obligations to comply with New York's local rent control regulatory schemes, is in error and should be reviewed by this Court.

III. CONCLUSION.

For the reasons set forth above, the City of Boston respectfully requests that this Court grant the petition, vacate the decision below and remand for reconsideration the Second Circuit's decision in view of this Court's ruling in *BLP* and *O'Melveny*.

Respectfully submitted,

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APPENDIX A.

CHAPTER X

HOUSING SERVICES

10-1 BOSTON HOUSING AUTHORITY.

No Ordinances Apply. See Special Statutes and Regulations. (CBC 1975 Ord. T10 c. 1)

10-2 RENTAL HOUSING EQUITY ORDINANCE.

10-2.1 Definitions.

When used in this section, unless the context otherwise requires, the following terms shall have the following meanings:

Administrator shall mean the chief administrative officer of the Rent Equity Board. The Administrator shall exercise the regular and customary functions of the Board, including conducting such hearings as may be required by this ordinance with respect to rent grievances, making such recommendations to the Board in accordance with the terms of this ordinance, and hiring and discharging employees of the Board.

Board shall mean the Rent Equity Board established by subsection 10-2.2.

Capital Improvement shall mean any rehabilitation, addition or improvement which appreciably adds to the value of the property or prolongs its life, or both, but not including ordinary repairs and maintenance.

Class of Housing Accommodations shall mean all housing accommodations within the City or any category of such housing accommodations based upon size, age, construction, rent, location, or other common characteristics.

Condominium or Cooperative Conversion Eviction shall mean an eviction of a tenant by a landlord for the purpose of removing such tenant from a housing accommodation in order to facilitate the initial sale and transfer of legal title to that housing accommodation as a condominium or cooperative unit to a prospective purchaser or an eviction of a tenant by any other person who has purchased a housing accommodation as a condominium or cooperative unit.

Condominium Unit shall mean a unit in a condominium at that term is defined in Chapter 183A of the General Laws of the Commonwealth of Massachusetts.

Controlled Housing Accommodations shall mean all housing accommodations as defined in "Housing Accommodations" in this subsection.

Consumer Price Index shall mean the consumer price index for all urban consumers in the Boston SMSA as published by the U.S. Department of Labor, Bureau of Labor Statistics.

Cooperative Unit shall mean a unit in a cooperative as that term is defined in Chapters 156B or 157 of the General Laws.

Conversion shall mean the initial sale or transfer of legal title to a housing accommodation and the recording of the master deed or articles of organization pursuant to Chapters 156B, 157 or 183A of the General Laws.

Decontrolled Housing Accommodation shall mean a former housing accommodation for which an affidavit has been filed with the Board pursuant to the provisions of paragraph e. of the definition of "Housing Accommodation" in this subsection.

Dormitory or Student Housing as used in subsection 10-2.12 shall mean any building, structure or part thereof rented or offered for rent by or for any educational institution for use as housing for undergraduate students, but shall not include units rented to individual students on the open market in the ordinary course of business.

Elderly Tenant shall mean a tenant who is at least sixty-two (62) years of age.

Handicapped Tenant shall mean a tenant who is physically handicapped as defined by Section 13A of Chapter 22 of the General Laws of the Commonwealth of Massachusetts or mentally handicapped as defined by 29 U.S.C. Section 706 (7)(b).

Housing Accommodation shall mean any building, structure or part thereof or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, within the City, including without limitation, houses, apartments, condominium units, cooperative units, rooming or boarding house units, mobile homes, trailers, or trailer or mobile home lots and other properties used for living or dwelling purposes, together with all services connected with the use or occupancy of such property, but not including the following:

a. Housing accommodations which

1. Are owned by a governmental unit, agency, or authority, provided, however, that none of the units exempted under this

paragraph a., (except for housing accommodations owned or acquired by the City of Boston) shall be eligible for vacancy decontrol under paragraph c. or paragraph e. under the definition of "Housing Accommodations" in this subsection after the basis for exemption under this paragraph a. ceases to exist; or,

2. Have mortgages insured or held by a governmental unit, except as provided in paragraph c. or paragraph f. below under the definition of "Housing Accommodation" in this subsection so long as and only to the extent that Federal or State law specifically pre-empts local rent control boards from regulating the rents for such housing accommodations, provided, however, that none of the units exempted under this paragraph shall be eligible for vacancy decontrol under paragraph c. or paragraph e. under the definition of "Housing Accommodation" in this subsection after the basis for exemption under this subsection ceases to exist; or,

3. Are under a Section 8 existing or moderate rehabilitation subsidy contract, under the rental rehabilitation program, the Chapter 707 certificate, moderate rehabilitation, or substantial rehabilitation programs or any other Federal, State, or local public subsidy program which guarantees that the tenant pays no more than thirty (30%) percent of adjusted income as the tenant's share of the rent, but only to the extent that such units remain under subsidy and the rent charged is within the subsidy contract authority of the agency providing subsidy on behalf of the tenant, provided, however, that rent increases which cause the rent to exceed the subsidy contract authority of the agency providing subsidy be subject to review by the Board under subsections 10-2.5, 10-2.6, or 10-2.7 as applicable and provided further, that if the basis for exemption under this paragraph a. ceases to exist, such units shall revert to their

prior controlled or decontrolled status for the purpose of rent regulation except that the landlord may apply for decontrol of a controlled unit if a voluntary vacancy occurred during the period of exemption.

4. Have mortgages which are financed by the Massachusetts Housing Financing Agency and are subject to the rent level determinations and rent approval requirements of Section 6 of Chapter 708 of the Acts of 1966, as amended (M.G.L. Chapter 23A, Appendix), provided, however, that none of the units exempted under this subsection shall be eligible for vacancy decontrol under subsection 10-2.1, paragraph c. or paragraph e. under the definition of "Housing Accommodations" after the basis for exemption under this subsection ceases to exist.

All such housing accommodations under this section, although exempt from local rent regulation, shall be subject to the operations of subsections 10-2.9 through 10-2.21 with regard to evictions and condominium or cooperative conversion and removal protections, except to the extent that the Federal or State law specifically exempts such housing accommodations from such protections; provided, however, housing accommodations which are owned by the Boston Housing Authority are exempt from all provisions of this section. Should such housing accommodations lose their eligibility for exemption from rent controls, the owner shall have the obligation, within thirty (30) days of such loss of eligibility, to petition the Board to establish the maximum lawful rent for such housing accommodations. Such maximum lawful rent shall be the rent lawfully charged as of February 1, 1988 adjusted to insure that such rent provides a fair net operating income as of the date of the loss of eligibility for exemption. In determining rents, the Board shall consider, but shall not set a fair net operating income in excess of, the amount of income available,

under a plan of action approved by the United States Department of Housing and Urban Development and the Executive Office of Communities and Development, at its discretion, pursuant to Title II of the Housing and Community Development Act of 1987 or under a comparable plan of action approved by the Executive Office of Communities and Development had the owner not pre-paid the mortgage; said plan of action shall be one which prevents the displacement of tenants and preserves the long-term affordability of all the units in the development; and provided further, however, housing accommodations described in paragraph 4. above shall be subject to the operations of subsections 10-2.10 with respect to condominium/cooperative conversion and removal permit protections but shall not be subject to the operation of subsection 10-2.9 with respect to eviction protections. Notwithstanding any other provision of this paragraph, with respect to any housing accommodations for which either (i) a Notice of Intent to Sell has been filed pursuant to Section 212 of the Low Income Housing Preservation and Resident Home Ownership Act of 1990 (Public Law 101-625, codified at USC 175(1) Note and referred to herein as "LIHPRHA") or (ii) a binding contract of sale has been executed between the owner and a bona fide tenant or community-based nonprofit organization to sell the housing accommodations pursuant to the Emergency Low Income Housing Preservation Act of 1987 (Public Law 100-242, as amended Public Law 100-628, Public Law 101-235, and Public Law 101-625, and referred to herein as "ELIHPA") and which lose their eligibility for exemption from rent control, the Board shall, upon petition by the owner, establish the maximum lawful rent for such housing accommodations as the rent which would be established if such housing accommodations were decontrolled housing accommodations for purposes of this section; provided however, that such owner must demonstrate in its petition that such owner has complied in

good faith with all applicable requirements of LIHPRHA or of the purchase contract entered into pursuant to ELIHPA, as applicable; and provided further that such housing accommodations shall continue to be subject to the operations of subsections 10-2.9 through 10-2.21 of the section. The provisions of the immediately preceding sentence shall not include projects for which a Notice of Intent to Sell has been filed under Section 604(b) or under Section 613(b)(1) of LIHPRHA.

The owner of housing accommodations which are subject to the provisions of this section and which, subsequent to January 10, 1983, receive a mortgage issued by the United States or the Commonwealth or any authority created under the laws thereof shall not be entitled to apply for a removal permit pursuant to subsection 2-10.11 or sent a notice pursuant to subsection 10-2.10 until the expiration of five (5) years from the date of the recording of said mortgage.

b. Housing accommodations in any building or structure containing no more than two (2) dwelling units, or containing no more than three (3) dwelling units, one of which is occupied by the owner thereof as his permanent residence; provided, however, that two (2) or more adjoining buildings or structures under common legal or beneficial ownership shall constitute a single building or structure shall be considered occupied by the owner thereof unless all beneficial owners occupy one or more dwellings therein as their permanent residence;

c. Housing accommodations constructed, created by conversion from a non-housing to a housing use, or in the opinion of the Board the entire building, structure or housing complex has been substantially rehabilitated so as to constitute the equivalent of new construction after December 1, 1968, with respect to conventionally financed housing accommodations, and

after January 1, 1975 with respect to housing accommodations described in paragraph a. under the definition of "Housing Accommodation" in this subsection, and after January 1, 1972, with respect to housing accommodations described in paragraph f. under the definition of "Housing Accommodation" in this subsection provided, however, conventionally financed housing accommodations created by conversion from a non-housing to a housing use, or in the opinion of the Board substantially rehabilitated between December 1, 1968 and December 1, 1971, so as to constitute the equivalent of new construction, shall be considered housing accommodations only for the purposes of subsections 10-2.10 through 10-2.22 inclusive of this section, and shall be treated as decontrolled housing accommodations only for the purposes of subsections 10-2.6 and 10-2.9 of this section;

d. Housing accommodations in hotels, motels, inns, tourist homes, and rooming or boarding houses which are occupied in the majority by transient guests staying for a period of fewer than fourteen (14) consecutive calendar days; provided, however, that the exception of said hotels, motels, inns, tourist homes, and rooming or boarding houses from the above definition may be reviewed at any time by the board;

e. Except with respect to a condominium or cooperative conversion eviction for the purposes of subsections 10-2.10, and 10-2.11, units of housing accommodations which are vacated voluntarily or pursuant to a court order on or after January 1, 1976. For purposes of this paragraph, units of housing accommodations shall be construed to have been so vacated when the legal occupant thereof is a person or persons other than the legal occupant of said unit prior to January 1, 1976, except for a spouse of the legal occupant, or any children of the legal occupant during the term of legal occupancy. The

owner of said vacated housing accommodation shall file with the Board an affidavit, under oath, declaring that the occupant vacated said accommodation voluntarily or pursuant to court order;

f. Housing accommodations which the United States or any Authority created under the laws thereof insures or insured the mortgage thereon pursuant to sections 207 or 220 of the National Housing Act, as amended, provided that such housing accommodations shall be considered housing accommodations only for the purposes of subsections 10-2.10 through 10-2.21 inclusive of this section, unless said housing accommodations is subject to an agreement pursuant to Mass. General Laws Chapter 121A with the City of Boston and/or the Boston Redevelopment Authority, in which case such housing accommodations shall be considered decontrolled housing accommodations only for the purposes of subsection 10-2.6 and shall be considered housing accommodations only for the purposes of subsections 10-2.9 through 10-2.21, provided further, housing accommodations which have mortgages insured under section 221(d) of the National Housing Act, as amended, and which have never received a federal rental subsidy or below market interest rate mortgage subsidy shall not be considered housing accommodations but shall be considered housing accommodations only for the purposes of subsections 10-2.10 through 10-2.21; and provided further, however, that if the titles of more than fifty (50%) percent of the units in housing accommodations which has or have mortgage insurance pursuant to section 220 of the National Housing Act, as amended, were transferred as condominium units to owner occupants and such titles were recorded at the Suffolk County registry of Deeds on or before December 31, 1983, such housing accommodations shall be exempt from all provisions of this section.

g. Mobile homes, trailers, or trailer or mobile home parks shall be considered housing accommodations only for the purposes of subsections 10-2.10 through 10-2.22 inclusive of this section, and shall be treated as decontrolled housing accommodations only for the purposes of subsections 10-2.6 and 10-2.9. Furthermore any tenant who received a notice of rent increase effective between March 1, 1987 and the effective date of this paragraph g.[1] shall be entitled to file a Rent Grievance Petition with the Board within forty-five (45) days after the date this paragraph g. goes into effect. Any notices of rent increase served on or after the effective date of this part g. shall be subject to the full requirements of subsection 10-2.6 and the applicable regulations.

For purposes of subsection 10-2.13, a mobile home or trailer shall be defined as a "mobile home" as that term is defined in Massachusetts General Laws Chapter 140 Section 32Q.

For purposes of subsection 10-2.13, a mobile home or trailer lot shall be defined as a lot rented or offered for rent for the purpose of installing a mobile home or trailer on a temporary or permanent foundation in a "Mobile Home Park' licensed pursuant to General Laws Chapter 140 Section 32B.

If a housing accommodation is exempt by operation of more than one of the provisions of these seven (7) parts, one of which provides a limited exemption and at least one of which is not so limited, then the provisions so the exemption not so limited shall apply, except the exemption described in part e., above, shall be deemed a limited exemption for purposes of this provision.

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[1]Editor's Note: This paragraph was adopted of § 2 of Ordinance 1987 c. 4, adopted on April 15, 1987.

Housing Services shall mean services or facilities provided by a landlord or required by law or by the terms of a rental housing agreement to be provided by a landlord to a tenant in connection with the use and occupancy of any housing accommodation, including without limitation, services, furniture, furnishings, and equipment; repairs, decorating and maintenance; provisions of light, heat, hot water, cold water, telephone and elevator service; kitchen, bath, and laundry facilities and privileges; use of halls, corridors, stairs, common rooms, yards and other common areas; maid service, linen service, janitorial service, removal of refuse, parking facilities, and any other benefit, privilege, or facility connected with the use or occupancy of any housing accommodation. Housing services to a housing accommodation shall include a proportionate share of the services provided to common facilities of the building in which the housing accommodation is located.

Landlord shall mean the individual who holds title to any controlled housing accommodation or decontrolled housing accommodation in any manner, including without limitation, a partnership, corporation, or trust. For purposes of this section, the rights and duties of the landlord hereunder shall be the obligation of anyone who manages, controls, or customarily accepts rent on behalf of the landlord.

Lodging house as used in subsection 10-2.12 shall mean any boarding house, lodging house or rooming house licensed or subject to licensing pursuant to General Laws Chapter 140 Section 23 but specifically not including dormitories, sororities, fraternities and any other kind of student housing, and not including any of the following: (1) units outside the jurisdiction of the Boston Rent Equity Board; (2) units leased by an educational institution on or before March 30, 1988 and now or hereafter used by such educational institution on or

before March 30, 1988 and now or hereafter used by such educational institution for dormitory or student housing purposes, provided an exemption pursuant to paragraph d. of the definition of "Housing Accommodation": in subsection 10-2.1 hereof has been obtained from the Rent Equity Board for such units on or before March 30, 1988; (3) units otherwise not subject to subsection 10-2.13. Such houses shall include but not be limited to any building, structure or complex which is designed for the letting of at least four (4) rooms to individuals not related to each other or the owner or operator thereof a spouse, grandparent, parent, child, sibling, aunt or uncle.

Lodging House Unit as used in subsection 10-2.12 shall mean any rent-controlled or decontrolled rental housing unit occupied or unoccupied in a Lodging House as that term is defined in subsection 10-2.12 part b.

Low- or Moderate-Income Tenant shall mean a tenant or group of tenants, all of whom occupy the same dwelling unit, whose total income for the twelve (12) months immediately preceding the date of any notice or the exercising of any right, whichever may occur later, is not more than one hundred (100) percent of the median income for the area as set forth in or determined based upon regulations promulgated from time to time by the United States Department of Housing and Urban Development pursuant to Section 8 of the Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, and calculated pursuant to said regulations.

Low-Income Tenant shall mean a tenant or group of tenants, all of whom occupy the same dwelling unit, whose total income for the twelve (12) months immediately preceding the date of any notice or the exercising of any right, whichever may occur later, is not more than fifty (50%) percent of the median income

for the area as set forth in or determined based upon regulations promulgated from time to time by the United States Department of Housing and Urban Development pursuant to Section 8 of the Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, and calculated pursuant to said regulations.

Mobile Home shall be as defined in this subsection paragraph g. under the definition of "Housing Accommodation".

Mobile Home Park shall mean "mobile home park" as defined in Section 32F of Chapter 140 of the Massachusetts General Laws.

Operating and Maintenance Expenses shall mean the reasonable and necessary expenses to a landlord of providing housing services to a tenant, including without limitation, maintenance, repair, management fee, real estate broker's commission, insurance, utilities included within the rent, but not including mortgage interest and amortization nor an allowance for obsolescence or depreciation.

Removal shall mean but is not limited to:

a. Condominium or Cooperative Conversion: This term shall mean any activity by a landlord, developer, investor or other person which would result, is intended to result, or does result in the change in form or ownership of any housing accommodation to a condominium or cooperative unit or in the sale or transfer of legal title of any housing accommodation as a condominium or cooperative unit. Such activities shall include but not be limited to:

1. The conversion of a controlled or decontrolled housing accommodation to condominium units in accordance with General Laws, chapter 183A; or

2. The conversion of a controlled or decontrolled housing accommodation to cooperative units in accordance with General Laws, Chapters 156B, 157, and 157B; or

3. The transfer, sale, marketing or advertisement of any housing accommodation as a condominium or cooperative unit.

Removal as used in subsection 10-2.12 shall mean:

a. Any activity by a landlord or any other person which would result or is intended to result in the sale and transfer of legal title of any controlled or decontrolled lodging house unit as a condominium or cooperative unit. Such activities shall include but not be limited to:

1. The conversion of controlled or decontrolled lodging house units to condominium units in accordance with General Laws, Chapter 183A, or

2. The conversion of controlled or decontrolled lodging house units to cooperative units in accordance with General Laws, Chapters 156B, 157, and 157B, or

3. The marketing, advertisement or sale of any controlled or decontrolled lodging house unit as a condominium or cooperative unit prior to the recording of a master deed or filing of Articles of Organization.

b. The change in occupancy of a controlled or decontrolled lodging house unit so as to no longer be a lodging house unit or

potential lodging house unit, including but not limited to changes in occupancy to: medical offices, professional offices, retail shops, hotels, motels, inns, parking facilities, dormitories, student housing, as well as such other changes in occupancy to any educational, industrial, religious, commercial, charitable, institutional or business purpose. Such changes in occupancy shall be subject to the provisions of this subsection whether the landlord makes the changes him/herself or whether the landlord leases or licenses the lodging house or individual lodging house units to a third party who makes such changes in occupancy.

c. The continued use of any housing unit which as of June 16, 1987 was a lodging house unit, for any non-lodging house purpose such as: a condominium, cooperative, student housing or dormitory unit.

d. The reduction of the total number of rental housing units in a building or structure by combining two (2) or more units or any parts thereof.

e. The demolition of any controlled or decontrolled lodging house unit.

f. The existence of a vacancy in a controlled or decontrolled lodging house unit for one hundred eighty (180) days or more, without a showing of good cause. Good cause shall include, but not be limited to:

1. Substantial rehabilitation or substantial upgrading of a unit for lodging house purposes; or

2. Seasonal vacancy of a unit.

Removal when used in subsection 10-2.13 shall mean and include any change of use or discontinuance of the use of part, or all of the land owned and licensed as a mobile home park, including, but not limited to, the licensee's conversion of the mobile home park, or part thereof, to a condominium or cooperative corporation.

Removal Permit shall mean a document issued by the Board, which is subject to such conditions as the Board may impose to allow removal of a controlled or decontrolled housing accommodation.

Rent shall mean the consideration, including without limitation, all bonuses, benefits, gratuities, or charges contingent or otherwise, demanded or received for, or in connection with, the use or occupancy of a housing accommodation, for housing services, or for the transfer of a lease of a housing accommodation.

Rental Housing Agreement shall mean an agreement, oral, written, or implied, between a landlord and a tenant for the use and occupancy of a housing accommodation and for housing services.

Tenant shall mean a tenant, subtenant, lessee, sublessee, or other person, entitled under the terms of a rental housing agreement to the use and occupancy of any housing accommodation. (Ord. 1972 c. 19; Ord. 1974 c. 13; Ord. 1975 c. 15; CBC 1975 Ord. T10 § 1; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33; Ord. 1985 c. 11, §§ 5, 6; Ord. 1987 c. 4; Ord. 1987 c. 6 § 1; Ord. 1987 c. 12 § 1; Ord. 1988 c. 9 §§ 2, 3, 4; Ord. 1988 c. 11 §§ 2, 3, 4; Ord. 1989 c. 1 § 1; Ord. 1989 c. 2 § 1; Ord. 1993 c. 10 § 1)

10-2.2 Rent Equity Board.[1],[2]

a. *Composition.* There shall be in the City of Boston a Board, known as the Rent Equity Board, consisting of five (5) residents of the City appointed by the Mayor, including two (2) tenants of rental housing units, who own no dwelling units; two (2) landlords, one of whom owns or manages at least twenty (20) rental dwelling units in the City, and one who owns or manages more than three (3), but less than twenty (20) rental dwelling units in the City; and one member representing the public interest, who shall have no prior involvement in advocacy on behalf of tenants or landlords, but shall represent a broad and unbiased public interest. The Administrator, with the approval of the Mayor, may serve as a public member of the Board. Members of the Board shall be appointed for a term expiring on the first Monday of the January following the next biennial municipal election at which a Mayor is elected. To the extent possible the Board shall reasonably reflect the racial composition of the City. The Administrator, if a member of the Board, shall not serve as Chairperson of the Board. The Board shall elect one of its members as Chairperson to serve in that capacity for a term of one (1) year. Vacancies shall be filled by the Mayor for the unexpired term. The Mayor may remove any member of the Board in accordance with the provisions of the City of Boston Code, Statutes, Title 5, Section 107.

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[1] **Editor's Note**: Ordinance 1987 c. 6 §6 is as follows:
SECTION SIX. NOTICE. Within 60 days after the passage of this ordinance the Rent Equity Board shall notify all residents of the City of the protections provided by Chapter 34 of the Ordinances of 1984 as amended. (See subsection 10-2.10 and subsection 10-2.12).

[2] **Editor's Note**: Ordinance 1987 c. 12 § 4 is as follows:
SECTION FOUR. NOTICE. Within 10 days after the passage of this ordinance, the Rent Equity Board shall notify all residents of mobile home parks in the City of Boston of the protections provided by this ordinance. (See subsection 10-2.13)

Compensation. Each member of the Board shall receive compensation for actual service in the amount of fifteen ($15.00) dollars per hour, or part thereof. The Administrator shall not receive any additional compensation for duties performed as a member of the Board, beyond the Administrator's salary. Members of the Board, other than the Administrator, are hereby classified as special municipal employees for the purpose of Chapter 268A of the General Laws of the Commonwealth of Massachusetts.

c. *Powers and Duties*. The Board shall be responsible for carrying out the provisions of this ordinance. The Board shall hire, with the approval of the Mayor, the Administrator. The Board shall promulgate such policies, rules, rulings and regulations, and shall issue such orders, as will further the provisions of this ordinance. The Board shall, as provided in subsections 10-2.4, 10-2.5 and 10-2.7, establish and adjust the maximum rent for housing accommodations; shall, as provided in subsection 10-2.6, adjust the rent for decontrolled housing accommodtions; shall, as provided in subsection 10-2.9, grant or deny certificates of eviction; shall, as provided in subsection 10-2.11, grant, deny or modify removal permits and shall bring such proceedings as may be necessary to enforce the provisions of this section or to enforce any policy, rule, ruling, regulation, or order promulgated or issued by the Board pursuant to this section. The Board may refer any appropriate matter to the assessing, building, fire, or housing inspection departments, or any other appropriate department, of the City, and may, at the request of any landlord, render a binding advisory opinion as to the permissible impact of a proposed capital improvement on the rents.

d. *Studies, Information, Investigations and Reports*. The Board may make such studies, conduct such hearings and in-

vestigations, and obtain such information as is deemed necessary in promulgating any regulation, rule or order pursuant to this ordinance and any regulations or order promulgated hereunder. For the foregoing purposes, a person may be summoned to attend and testify, to produce documents, and to prepare in a like manner as he may be summoned to attend as a witness before a court and before the City Council under Section 8 of Chapter 233 of the General Laws of the Commonwealth of Massachusetts. Any person who rents or offers for rent or acts as broker or agent for the rental of any controlled housing accommodation or decontrolled housing accommodation may be required to furnish under oath any information required by the Board which relates specifically to said housing accommodations, to provide records and other documents, and to make reports. Such persons shall have the right to be represented by counsel, and a transcript shall be taken of all testimony and such person shall have the right to examine said transcript at reasonable times and places. Section 10 of Chapter 233 of the General Laws of the Commonwealth of Massachusetts shall apply. The Board shall recommend adoption of such amendments as may be necessary to carry out the purposes of this section.

e. *Determination of Invalidity*. In the event that any policy, rule, ruling, regulation or order promulgated by the Board is held invalid by any court of competent jurisdiction, the Board shall forthwith amend or revoke such policy, rule, ruling, regulation or order, and cease further enforcement thereof, to the full extent required in order to conform to the principles and reasoning set forth in the decision of such court, and such decision shall be deemed binding upon the Board in connection with any and all pending matters.

f. The Board shall confer with interested parties, including but not limited to representatives of landlords, tenants, and community development corporations in order to develop written recommendations to the City Council and the Mayor for amendments to the section which will foster the preservation of housing accommodations constructed or developed pursuant to Sections 202, 221(d)(3), and 236 of the National Housing Act as housing which will remain affordable to the low-income tenants and moderate income tenants presently residing in such accommodations, including but not limited to incentives for limited equity cooperative ownership by such tenants and appropriate requirements for tenant financial contribution. The Board shall also study and make recommendations on the need for any additional procedures regarding evictions from housing which has mortgages which are financed by the Massachusetts Housing Finance Agency (MHFA). Such study shall include an analysis of present and proposed MHFA hearing procedures. The Board shall report all of its recommendations under this provision by June 30, 1989.

g. *Charges*. The Board shall require every landlord of rent controlled or vacancy decontrolled housing accommodations to pay an annual charge for services provided by the Board under this section. Such charge shall be for such services as, without limitation, the Board's cost of maintaining records regarding the landlord's housing accommodations; the Board's calculations of the landlord's annual general adjustment of maximum rent; and the Board's developing, mailing, and otherwise providing printed information and forms regarding rent control, vacancy decontrol and other related matters. Such charge shall be established by the Board by regulation on a fiscal or calendar year basis and shall be charged per individual housing accommodation, whether such housing accommodation is occupied or unoccupied. The Board may establish a

charge by subclass for such housing accommodations. Any such annual charge established by the Board shall be reflective of the costs incurred by the Board in providing services under this section; provided, however, that in no event shall such annual charge be less than twelve ($12.00) dollars nor more than thirty-six ($36.00) dollars per year per individual housing accommodation. The annual charge shall be payable to the City of Boston by the landlord, and the Board shall establish by regulation the time, place and manner for such payment. The Board shall insure that all charges collected pursuant to this ordinance are deposited with the Collector-Treasurer. After such payment has been made, the landlord may charge all or part of the annual charge for each such housing accommodation to the tenants thereof. For purposes of this section, if the landlord so acts, said charge shall be rent, as defined by City of Boston Code, Ordinances, Chapter X, Section 10-1.2.

If a landlord has failed to pay such charge as required, all petitions, applications or other like submissions filed with the Board by such landlord requesting Board action shall be deemed defective and the Administrator shall administratively dismiss such petition, application or submission.

A general adjustment of maximum rent for any class of rent controlled housing accommodation shall not be applicable and an increase shall not be authorized for such housing accommodation where the landlord fails to pay the annual charge required herein for such housing accommodation. Notwithstanding anything stated in this section to the contrary, the Administrator may allow a petition, application or other submission to go forward, and may allow a general adjustment of maximum rent to be applicable and a rent increase to be authorized, if a landlord who has not paid the charge required herein shows, and the Administrator finds, good cause for such nonpayment.

(Ord. 1972 c. 19; Ord. 1974 c. 13; Ord. 1975 c. 15; CBC 1975 Ord. T10 § 2; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33; Ord. 1984 cs. 7, 29-34; Ord. 1988 c. 9 § 10[e]; Ord. 1988 c. 11 § 5; Ord. 1989 c. 1 § 2; Ord. 1989 c. 7 § 1; Ord. 1991 c. 2 §1)

10-2.3 Registration.

The Board may require registration of all controlled housing accommodations on forms approved by the Administrator. Whoever fails to file in a timely manner any statement or information required to be filed under this section shall, in addition to all other penalties pursuant to subsection 10-2.17, be subject to a fine of up to fifty ($50.00) dollars per calendar day, or part thereof, that such failure continues. No petition for an upward adjustment of maximum rent shall be accepted by the Board until all statements and information required to be filed pursuant to this section have been filed, and all such petitions received prior to such filing shall be dismissed by the Board.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 3; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33)

10-2.4 Maximum Rent.

The maximum rent of a controlled housing accommodation shall be the rent which was established under Chapter 842 of the Acts of 1970, and Section 13(a) of Chapter 19 of the Ordinances of 1972, as amended as adjusted by the Board pursuant to Chapter 15 of the Ordinances of 1975 as amended

or Chapter 1 of the Ordinances of 1983, as amended, whichever is applicable; provided, however, the maximum rent for a rent controlled housing accommodation in a cooperative shall be the rent charged as of May 1, 1982. If the maximum rent of a controlled housing accommodation has not otherwise been established, it shall be established by the Board. Any maximum rent for a controlled housing accommodation shall be adjusted subsequently in accordance with the provisions of subsections 10-2.5 and 10-2.7.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 4; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33)

10-2.5 Adjustment of Maximum Rent.

a. *General Adjustments.* Commencing in 1985, the Board shall annually adjust the maximum rent established pursuant to subsection 10-2.4 by percentage, for all controlled housing accommodations which have not received an adjustment during the prior calendar year and which are in compliance with Article II of the State Sanitary Code. Each such maximum rent shall be adjusted in an amount equal to the percentage increase or decrease in the consumer price index during the prior calendar year, said adjustment to become effective on the first day of June of each year commencing on June 1, 1985.

The Board may, by order or regulation as provided in subsection 10-2.7, make such other general adjustments, either upward or downward, in the maximum rent established by subsection 10-2.4 for all controlled housing accommodations or any class thereof as may be necessary to remove hardships or to correct other inequities, and in so doing, shall observe the principle of maintaining maximum rents for controlled

housing accommodations at levels which will yield to landlords a fair net operating income from such housing accommodations.

The Board shall cause a notice of any such general adjustment of maximum rents for controlled housing accommodations to be published three (3) times in at least one newpaper of general circulation in the City at least thirty (30) days prior to the effective date thereof and shall send to all landlords of controlled housing accommodations a copy of said notice by first class mail.

b. *Individual Adjustments*. The Board shall by order as provided in subsection 10-2.7, make such individual adjustments, either upward or downward, of the maximum rents established by subsection 10-2.4, or as adjusted pursuant to paragraph a. of this subsection, for any controlled housing accommodation as may be necessary to remove hardships or to correct other inequities, and in so doing, shall observe the principle of maintaining maximum rents for controlled housing accommodations which will yield to landlords a fair net operating income from such housing accommodations.

c. *Fair Net Operating Income*. In determining whether the maximum rent for a controlled housing accommodation yields a fair net operating income, the Board shall consider, without limitation, the following relevant factors:

1. Increases or decreases in property taxes;

2. Unavoidable increases or any decreases in operating and maintenance expenses;

3. Capital improvement of the controlled housing accommodation;

4. Increases or decreases in living space or housing services; and

5. Substantial deterioration of the controlled housing accommodation, other than ordinary wear and tear, or failure to perform ordinary repair, replacement or maintenance.

d. For the purposes of adjusting rents under the provisions of paragraph b. of this subsection, the Board may promulgate a schedule of standard rental increases or decreases for improvement or deterioration of specific housing services.

e. *Denial of Adjustment.* Notwithstanding any other provisions of this subsection, the Board may deny or refuse to grant any upward adjustment of the maximum rent for a controlled housing accommodation, if, upon petition of the tenant, it determines that the affected controlled housing accommodation does not comply with Article II of the State Sanitary Code or the State Building Code or the Boston Fire Prevention Code or any other applicable municipal code, ordinance, or State law, regulating the conditions or occupancy of housing accommodations. The Board may refuse to make a downward adjustment of the maximum rent for a controlled housing accommodation if it determines that the tenant is more than sixty (60) days in arrears in tendering rent for such housing accommodation, unless such arrearage is due to a withholding of rent pursuant to the provisions of Section 127L of Chapter 111 or Section 8A of Chapter 239 of the General Laws of the Commonwealth of Massachusetts. For the purposes of this paragraph, an inspection report of a Board inspector or of any authorized State or City inspector or investigator shall be prima facie evidence that the conditions or lack of compliance reported exists.

f. The Board may remove maximum rent levels established pursuant to subsections 10-2.4, 10-2.5 or 10-2.7, for any class of controlled housing accommodations if, in its judgment the need for continuing such maximum rental levels no longer exists because of sufficient construction of new housing accommodations, the rental levels for which are comparable to the rental levels of the class of controlled housing accommodations for which the maximum rental levels are to be discontinued or because the demand for housing accommodations has otherwise been met. Any maximum rental level removed pursuant to this paragraph shall be reimposed or adjusted and reimposed upon a finding by the Board that a substantial shortage of housing accommodations exist and that such reimposition is necessary to serve the public interest. Any action under this paragraph shall be subject to the hearing and notice requirements of paragraph b. of subsection 10-2.7.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 5; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33)

10-2.6 Rent Grievances.

All elderly, handicapped, or low- or moderate-income tenants of decontrolled housing accommodations may petition the Board on a form approved by the Administrator for a downward adjustment of the rent for such a housing accommodation if the landlord has increased the rent for such a housing accommodation by percentage which is greater than the percentage increase in the consumer price index for the twelve (12) months immediately preceding the date of said tenant's petition. For the purpose of preventing rent gouging, all other tenants of decontrolled housing may petition the Board on a form approved by the Administrator for a downward adjustment of the

rent for such housing accommodation if the landlord has increased the rent for said tenant's housing accommodation by a percentage greater than ten (10%) percent in any one year. The Board shall, at least annually, take all reasonable steps to make such tenant aware of the provisions of this subsection and the rights and protections of all tenants existing pursuant to this section. The Administrator shall conduct a hearing with respect to all such petitions filed and shall make a recommendation to the Board. The Board shall not be bound by the Administrator's recommendation and shall evaluate independently the evidence as presented to the Administrator. The Board shall act within a reasonable time after receiving the Administrator's recommendation; provided, however, such action shall occur within sixty (60) days after the Board's receipt of a petition. Until a decision has been made by the Board in favor of the tenant, the tenant shall be obligated to tender such rent increase as lawfully required by the landlord; provided, however, the Board shall order repayment. The Board may by regulation modify the hearing procedure provided for in this section to serve the public interest.

Any such petiton shall be filed with the Board within forty-five (45) days after the tenant's receipt of the landlord's notice of the rent increase; provided, however, the Board may extend such period for filing if the tenant was unable to file the petition due to illness, absence from the City, or other good cause. The Administrator shall notify the landlord upon receipt of a petition. Failure on the part of the landlord to appear at a hearing, either in person or through counsel, on a tenant's petition pursuant to this subsection shall result in an automatic approval of said tenant's petition.

Within forty-five (45) days after the effective date of this section, annually on the second day of January, beginning in 1985, and as part of any notice of an increasee in the rent for any decontrolled housing accommodation, and upon a tenant's initial taking of occupancy in a unit of a housing accommodation, every tenant shall be notified in writing of his right to file a rent grievance with the Board pursuant to this subsection. Such notice shall be in a form which has been approved by the Administrator and shall contain information respecting the conditions of eligibility and the procedure for such rent grievances. On or before February 1st of each year, the landlord shall file with the Board an affidavit, under penalty of perjury, that he has caused the notice to be mailed on or about January 2 to each such tenant. Notwithstanding any other provisions of this subsection, no landlord shall receive more than one rent adjustment in any twelve (12) month period.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 6; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33)

10-2.7 Rent Adjustment Proceedings of Controlled Housing Accommodations.

a. *Individual Adjustment of Maximum Rent*. The Board shall consider an adjustment of rent for an individual controlled housing accommodation upon receipt of a petition for adjustment filed by the landlord or tenant of such housing accommodation or upon its own initiative. Such petition shall be made on a form approved by the Administrator. The Board shall notify the landlord and tenant if the petition was filed by the tenant, or the tenant and landlord if the petition was filed by the landlord, upon receipt of such petition of the right of either party to request a hearing in writing within fifteen (15) calendar

days after the receipt of such notice, or the Board may schedule a hearing upon its own initiative. If a hearing is requested in a timely manner by either party, or if the action is undertaken upon the initiative of the Board, notice of the time and place of the hearing shall be furnished to the landlord and the tenant and the hearing shall be conducted before a designee of the Board. The Board may consolidate petitions and actions taken under its own initiative relating to controlled housing accommodations in the same building or development, and all such petitions and actions may be considered in a single hearing.

b. *General Adjustment of Maximum Rent by Regulation.* Upon its own initiative, the Board may make a general adjustment, in addition to those required by paragraph a. of subsection 10-2.5, by percentage or otherwise, of the rental levels for any class of controlled housing accommodations subject to such conditions, if any, as the Board shall determine. Prior to making such adjustments, a public hearing shall be held before at least a majority of the Board. Notice of the time, place and purpose of such hearing shall be published three (3) times in at least one newspaper of general circulation in the City, the first such publication shall appear at least thirty (30) days prior to the scheduled date of said hearing.

c. *Limitations on Petitions for Individual Adjustment.* Notwithstanding any other provision of this subsection, the Board may, without holding a hearing, refuse to adjust the maximum rent for an individual controlled housing accommodation and may dismiss any petition for adjustment if a decision has been made with respect to the maximum rent for such housing accommodation within the preceding twelve (12) months or if the Board finds that the petition for adjustment is filed for the purposes of harassment or for any other purpose not intended by this section.

d. Hearings required under paragraph a. shall be conducted in accordance with the provisions of Section 11 of Chapter 30A of the General Laws of the Commonwealth of Massachusetts, except that requirements (7) and (8) of said Section 11 shall not apply to such hearings.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 7; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33)

10-2.8 Information to be Supplied in Connection with Tenant Petitions and Board Initiated Actions for for Adjustment — Controlled Housing Accommodations.

Upon receipt by the Board of a tenant petition for adjustment of maximum rent for a controlled housing accommodation, or upon action initiated by the Board for adjustment of maximum rent for any such housing accommodation, the landlord shall furnish to the Administrator, within fifteen (15) days after a written demand thereof, an information statement in forms approved by the Administrator. Whoever fails to file in a timely manner any information required to be filed under this subsection may, in addition to all other penalties pursuant to subsection 10-2.17, be subject to a fine of up to fifty ($50.00) dollars per calendar day, or part thereof, that such failure continues.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 8; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33)

10-2.9 Evictions; Controlled and Vacancy Decontrolled Housing Accommodations.

a. No person shall bring any action to recover possession of a controlled or vacancy decontrolled housing accommodation unless:

1. The tenant has failed to pay the rent to which the landlord is legally entitled;

2. The tenant has violated an obligation or covenant of tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord;

3. The tenant is committing or permitting to exist a nuisance in, or is causing substantial damage to, the housing accommodation, or is creating substantial interference with the comfort, safety, or enjoyment of the landlord or other occupants of the same or any adjacent housing accommodation;

4. The tenant is convicted of using or permitting a housing accommodation to be used for any illegal purpose;

5. The tenant, who had a written rental housing agreement which terminated on or after the passage of this section has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this section;

6. The tenant has refused the landlord reasonable access to the housing accommodation for the purpose of making necessary repairs or improvements required by the laws of the United States, the Commonwealth of Massachusetts, or any subdivision thereof, or for the purpose of inspection as permitted or required by the lease or by law, or for the purpose of showing the housing accommodation to any prospective purchaser or mortagee;

7. The tenant holding at the end of a lease term is a subtenant not approved by the landlord;

8. The landlord seeks to recover possession in good faith for the use and occupancy of himself, or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law provided, however, that the provisions of this subsection shall not apply to a controlled or vacancy decontrolled housing accommodation

(a) which is occupied by a tenant entitled to protections under paragraph k. of subsection 10-2.10 or

(b) for which a master deed was or articles of organization were duly recorded after May 4, 1988, pursuant to General Laws chapters 183A, 156B, 157 or 157B.

Notwithstanding any other provisions of this section, including, but not limited to, the preceding sentence and paragraph k. of subsection 10-2.10, the Board shall issue a certificate of eviction to the owner of a condominium or cooperative housing accommodation who has satisfied the Board that the following requirements have been met:

(c) The owner legally occupied the housing accommodation continuously for at least one year as his or her principal residence after conversion or removal; and

(d) The owner subsequently rented the housing accommodation to a tenant; and

(e) All the legal owners demonstrate that they, in good faith, intend to reside in the housing accommodation as their principal residence.

9. The landlord seeks to recover possession to demolish the same in compliance with a lawful government order;

10. Recovery of possession in order to remove a controlled or decontrolled housing accommodation shall not be a valid reason to recover possession of a housing accommodation occupied by a tenant protected by paragraph k. of subsection 10-2.10 or of any controlled or decontrolled housing accommodation for which a master deed was or articles of organization were duly recorded after May 4, 1988 pursuant to General Laws Chapters 183A, 156B, 157 or 157B.

11. The landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purposes of this section.

A landlord seeking to recover possession of a controlled or vacancy decontrolled housing accommodation shall apply to the Board for a certificate of eviction. Upon receipt of such an application, the Board by first class mail, shall send a copy of the application to the tenant of the controlled or vacancy decontrolled housing accommodation together with a notification of all rights and procedures available pursuant to this subsection. If the Board finds that the facts attested to in the landlord's petition are valid and in compliance with paragraph a., the certificate of eviction shall be issued.

A landlord who seeks to recover possession of a controlled or vacancy decontrolled housing accommodation without a certificate of eviction shall be deemed to have violated this section, and the Board shall initiate a criminal prosecution for such violation. Notwithstanding the provisions of this paragraph, the United States, the Commonwealth of Massachusetts, or any agency or political subdivision thereof may maintain an action or proceeding to recover possession of any housing accommodation operated by it where such action or proceeding is authorized by the statute or regulation under which such accommodations are administered.

The provisions of this paragraph shall be construed as additional restrictions upon the right to recover possession of a controlled or vacancy decontrolled housing accommodation. No provision of this subsection shall entitle any person to recover possession of such a controlled or vacancy decontrolled housing accommodation. Upon a decision of the Board concerning the granting or withholding of a certificate of eviction, either party concerned may appeal to the District Court Department of the Trial Courts for the judicial district within which the controlled or vacancy decontrolled housing accommodation is located or to the Housing Court Department of the Trial Courts, City of Boston Division, within thirty (30) calendar days after such decision.

b. Notwithstanding the provisions of the preceding paragraph, a landlord may seek to recover possession of a vacancy decontrolled housing accommodation without applying for a certificate of eviction if the sole basis for the eviction is nonpayment of rent and if the notice to quit and complaint are served and filed after July 1, 1988. Provided, however, that in any action brought pursuant to this paragraph, if the trial court finds that the landlord's claims were wholly insubstantial, frivolous or not advanced in good faith, then damages shall be awarded to the tenant pursuant to Massachusetts General Laws Chapter 231, S. 6F and any other applicable statutes. (Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 9; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33; Ord. 1987 c. 6 § 3; Ord. 1988 c. 9 §§ [A], [B], [C], [D], [E])

10-2.9A Rights of Elderly and Handicapped Tenants to Have Pets.

a. Notwithstanding the provisions of any lease or rental agreement to the contrary, no owner of a controlled or decon-

trolled housing accommodation subject to the jurisdiction of the board may, as a condition of tenancy or otherwise, prohibit or prevent any elderly or handicapped tenant from owning common household pets or having such pets living in the tenant's unit. Furthermore, no owner of a controlled or decontrolled housing accommodation shall have the right to restrict or discriminate against any elderly or handicapped tenant in connection with admission to, or continued occupancy of, such housing by reason of the tenant's ownership of common household pets or the presence of such pets in that tenant's unit. The owner of such housing accommodations shall have the right to promulgate reasonable requirements regarding the number of common household pets allowed in each unit, standards of pet care, licensing, inoculation, and leash laws, similar to those developed by the Massachusetts Society for the Prevention of Cruelty to Animals, and consistent with State and local laws on animal control, such as G.L. c. 140 — 136A-17AD. Nothing in this provision shall bar the owner from requiring the removal of any pet if the pet's conduct or condition is determined to constitute a nuisance or a threat to the health or safety of other occupants of the building, structure, or development of other persons in the community where the housing accommodation is located.

b. *Scope*. Notwithstanding the exemptions found in subsection 10-2.1, the definition of "housing accommodation", all housing accommodations in mobile homes, in mobile home parks, and in structures having three (3) or more dwellings, excluding motels, hotels, or inns, and excluding housing accommodations in structures having three (3) dwelling units, one (1) of which is occupied by all the legal and beneficial owners of the structure as their principal residence, shall be subject to the provisions of this subsection. (Ord. 1988 c. 13 §§ 1,2)

10-2.10 Condominium and Cooperative Conversion; Evictions.

a. All condominium and cooperative conversion evictions from housing accommodations as defined in subsection 10-2.1 be governed by the eviction control provisions of subsection 10-2.9 as modified by the provisions of these subsections 10-2.10 and 10-2.11.

b. *Presumption*. For purposes of this section, any action to recover possession of housing accommodation shall be presumed by the Board to be a condominium or cooperative conversion eviction where any one or more of the following has occurred:

1. Any dwelling unit in any building or structure in which the housing accommodation is located has been sold as a condominium or cooperative unit; or

2. A master deed or articles of organization for the building or structure in which the housing accommodation is located for which recovery of possession is sought has been duly recorded pursuant to the provisions of Chapters 156B, 183A, or 157 of the General Laws of the Commonwealth of Massachusetts; or

3. A master deed or articles or organization for the building or structure in which the housing accommodation is located for which recovery of possession is sought is duly recorded pursuant to the provisions of Chapters 183A, 156B, or 157 of said General Laws within one hundred and eight (180) days after an action is brought to recover such possession; or

4. Any tenant of any unit of housing accommodation in the building or structure wherein the unit of housing accommodation is located for which recovery of possession is sought has received any notice required by paragraph c. of this subsection; provided, however, that a landlord may seek to recover possession of a housing accommodation when any of 1, 2, 3, or 4, occurs for purposes other than a condominium or cooperative conversion when the landlord has filed with the Board an affidavit under the penalty of perjury, stating that such eviction is not for the purpose of converting the housing accommodation to a condominium or cooperative unit.

c. *Notices*. No person shall bring any action to recover possession of a housing accommodation for the purpose of a condominium or cooperative conversion until the later of the expiration of the rental housing agreement or one year has elapsed after the date the tenant of such housing accommodation received a written notice of termination of his tenancy; provided, however, that, in the case of a dwelling unit occupied, in whole or in part, by an elderly, handicapped or low- or moderate-income tenant upon the date of the notice, until three (3) years after such date has elapsed. The burden of proving qualification with respect to age, handicap, and income shall rest with the tenant.

All notices given pursuant to this subsection shall be personally served upon the tenant or mailed to the tenant by certified mail, return receipt requested, and shall advise the tenant of the rights and procedures available under this section.

No action to recover possession of a housing accommodation for condominium or coopeerative conversion shall be effective unless a master deed o. articles of organization for the building or structure in which the housing accommodation is located has

been duly recorded pursuant to the provisions of Chapters 183A, 156B or 157 of the General Laws of the Commonwealth of Massachusetts, prior to or within the one-year or three (3) year time period specified in this section for notice to tenant of such housing accommodations. Except with respect to de-controlled housing accommodation, upon expiration of the notice period as provided herein, the landlord must provide proof satisfactory to the Board that he has complied with the provisions of this section with respect to recovery of a housing accommodation in order to convert it to a condominium or a cooperative. If the Board finds that the proof is valid and in compliance with the provisions of this section, a certificate of eviction shall be issued.

If a landlord of a decontrolled housing accommodation seeks to recover possession of such housing accommodation for any reason other than to effect a condominium or cooperative conversion prior to the expiration of the notice period as provided in this subsection, and where appropriate, he has filed with the Board the affidavit prescribed by paragraph b.4 of this subsection, no certificate of eviction shall be required.

Upon expiration of the notice period as provided in this subsection, no landlord of a decontrolled housing accommodation shall be required to obtain a certificate of eviction from the Board as a prerequisite to recovering possession of such decontrolled housing accommodation in order to effect a condominium or cooperative conversion; provided, however, that such landlord shall file with the Board an affidavit, under the penalty of perjury, that he has complied with the requirements imposed by this subsection.

d. *Rent and Rental Housing Agreement Protection.* For any tenant who receives or is entitled to receive as notice as provided

in this subsection, the landlord shall extend such rental housing agreement upon the expiration thereof, such extension or extensions shall be for a period or periods of one year or fraction thereof as shall equal the period of notice to which such tenant is entitled pursuant to the provisions of this subsection. The provisions of such rental housing agreement may not be modified by the landlord except to the extent such modification is required by law and except with respect to the amount of annual rent, any increase in which shall not exceed an amount equal to the sum which would result by multiplying said rent by the percentage increase in the consumer price index during the calendar year immediately preceding the date upon which such rental housing agreement is extended.

e. *Right to Purchase Unit.* Any tenant who receives or is entitled to receive notice pursuant to this section shall be given the right to purchase the dwelling unit he occupied at the time such notice is delivered, for substantially the same or more favorable terms and conditions as are being offered to prospective purchasers. Such tenant may exercise a right of first refusal to purchase such unit by executing a purchase and sale agreement prior to the expiration of ninety (90) days after the date of receiving a copy of the purchase and sale agreement properly executed by the person offering the unit for sale.

f. *Relocation Benefit.* Any tenant who receives or is entitled to receive a notice pursuant to this subsection, who chooses not to exercise the right to purchase the unit he or she occupies pursuant to paragraph e. hereof or who does not purchase another unit or units in the same building or buildings, shall, upon vacating said unit within the appropriate notice period as established by paragraphs c. and g. hereof, be paid by the landlord a relocation expense allowance of seven hundred fifty ($750.00) dollars per housing accommodation; provided, how-

ever, that if such tenant is elderly, handicapped or of low or moderate income, said relocation expense allowance shall be one thousand ($1,000.00) dollars per housing accommodation.

g. *Relocation Service to Elderly, Handicapped, or Low- or Moderate-Income Tenants.* Whenever a housing accommodation is converted to the condominium or cooperative form of ownership and such conversion results in the displacement of an elderly, handicapped, or a low- or moderate-income tenant who qualified as such on the date of the notice required by paragraph c. of this subsection, the landlord shall, in addition to paying the relocation expense allowance required by paragraph f. of this subsection, assist said tenant in locating a comparable housing accommodation within the City which rents for a sum which is suitable and appropriate in relation to said tenant's financial condition and annual income. If said tenant has resided in the housing accommodation from which he is being displaced for at least three (3) years, the landlord shall make every reasonable effort to locate such substitute housing accommodation for said tenant within the same neighborhood of the City. If the landlord is unable to locate such substitute housing accommodation for such tenant within the period of notice required by paragraph a. of this subsection, the tenant may petition the Board for an extension of the period of the notice required by paragraph a. The Board may extend such period of notice for low- or moderate-income tenants for up to any additional period of two (2) years; but shall extend such period of notice for an additional period of two (2) years for elderly or handicapped tenants.

h. *Low-Income Tenant, or Low- or Moderate-Income Elderly, or Low- or Moderate-Income Handicapped Tenant.* Notwithstanding all notice periods and extensions thereof, as set forth in this subsection, a "low-income tenant" as defined in

subsection 10-2.1 and any low- or moderate-income elderly or any low-or moderate-income handicapped tenant shall not be evicted because of condominium or cooperative conversions for the duration of this section.

i. Any tenant or tenants who have received a notice of eviction for the purpose of a condominium or cooperative conversion shall be refunded their prepaid rent and security deposits, to the extent permitted under Section 15B of Chapter 186 of the General Laws of the Commonwealth of Massachusetts.

j. During the notice periods set forth in paragraphs c., g. and h. of subsection 10-2.10, all housing accommodations as to which possession is sought for the purpose of a condominium or cooperative conversion shall be assessed for real estate tax purposes as a residential rental premises and not as condominiums or cooperatives.

k.1. Notwithstanding any other provisions of this subsection to the contrary except as provided below in subparagraph 3 of this paragraph k. and as provided in paragraph h. of this subsection no landlord or other person shall bring any action to recover possession of a housing accommodation for purposes of condominium or cooperative conversion occupied by a low or moderate income tenant, as defined in subsection 10-2.1 "Low- or Moderate Income Tenant" or occupied in whole or in part by an elderly tenant as defined in subsection 10-2.1 or a handicapped tenant as defined in subsection 10-2.1 regardless of their income or the income of any other tenant in the housing accommodation unless, prior to March 25, 1987, the landlord or other person has:

(a) Given proper notice to the tenant under this section and regulations promulgated hereto; or

(b) Properly applied to the Rent Equity Board for Condominium/Cooperative Conversion Eviction Packages pursuant to this section and regulations promulgated hereto.

However, if for any reason this subparagraph is held to be invalid by a court of competent jurisdiction, then the provisions of paragraph k., subparagraph 2 shall apply.

2. Notwithstanding any other provisions of this section to the contrary (except as provided in subparagraph 3 of paragraph k. and in paragraph h. of this subsection) no landlord or other person shall bring any action to recover possession of a housing accommodation for purposes of condominium or cooperative conversion occupied by a low or moderate income tenant, as defined in subsection 10-2.1 or occupied in whole or in part by an elderly tenant as defined in subsection 10-2.1 or a handicapped tenant as defined in subsection 10-2.1, regardless of their income or the income of any other tenant in the housing accommodation unless, prior to May 6, 1987, the landlord or other person has:

(a) Given proper notice to the tenant under this subsection and regulations promulgated hereto; or

(b) Properly applied to the Rent Equity Board for Condominium/Cooperative Conversion Eviction Packages pursuant to this section and regulations promulgated hereto.

3. Notwithstanding any other provisions of paragraph k. subparagraphs 1 and 2, the Board may, after the hearing, provide for an exception to the condominium/cooperative evic-

tion ban established by paragraph k. in individual cases if the Board determines that such a ban would cause a substantial hardship except that, consistent with section 10 paragraph h. of this subsection there shall be no exception to the ban for units occupied by low income tenants, and low or moderate income elderly and/or handicapped tenants. In making its determination, the Board shall review and consider relevant factors and shall, at a minimum, make findings on the following factors:

(a) The benefits and detriments to the persons whom this section and this subsection seeks to protect;

(b) The hardships imposed on the tenant[s] residing in the housing accommodation that is to be converted; and

(c) Circumstances demonstrating hardship and inequity to the landlord seeking to bring the eviction or give the notice.

1. Notwithstanding any other provisions of this section, no person shall bring any action to recover possession of a controlled or vacancy decontrolled housing accommodation for the purpose of removal, whether or not a removal permit or a certificate of exception has been issued, if:

1. The tenants are protected pursuant to paragraph i. of this subsection; or

2. If the master deed was or articles of organization were duly recorded after May 4, 1988, pursuant to General Laws chapters 183A, 156B, 157 or 157B. (Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 10; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33; Ord. 1985 c. 11 § 2; Ord. 1986 c. 20 §§ 2, 3, 4, 5; Ord. 1987 c. 6 § 1 [K]; Ord. 1988 c. 9 § 7 [M]

10-2.11 Removal of Housing Accommodations Regulated.

a. *Terms Defined.* All terms used herein shall have the meanings defined in Section 1 of Chapter 34 of the Ordinances of 1984, as amended[1], except that as used herein, the term "housing accommodation" as contained in subsection 10-2.1 shall not include: "mobile homes, trailers, or trailer or mobile lots or lodging, rooming or boarding house units."

b. *Removal of Housing Accommodations Regulated.* Except as provided in this subsection, it shall be unlawful for any owner or other person to remove any housing accommodation unless the Board, after hearing, grants a removal permit. The Board may issue such orders and promulgate such regulations as are necessary to effectuate the purposes of this subsection, and prescribe, consistent with with this subsection, the procedure for applications, notice, hearings and the grant and review of removal permits. Provided, however, that the requirements of this subsection shall not apply to any building or structure containing no more than two (2) dwelling units or containing no more than three (3) dwelling units, one (1) of which is occupied by the owner thereof as his permanent residence consistent with the requirements of subsection 10-2.1 paragraph b. under the definition of "housing accommodation".

c. *Eviction.* Eviction of tenants from controlled or decontrolled housing accommodations is governed by subsection 10-2.9 as modified by subsections 10-2.10 and 10-2.11. Issuance of a removal permit does not relieve any person of compliance with the eviction procedures contained in this section.

d. *Exceptions.* Except as otherwise required by this section including, but not limited to, the requirements contained in subsection 10-2.12 relating to lodging and rooming houses, no removal permit shall be required for the removal of any housing

[1] **Editor's Note:** Refer to subsection 10-2.1.

accommodation for which on or before May 4, 1988, a master condominium deed or articles of organization for the building in which the housing accommodation is located has been duly recorded pursuant to the provisions of General Laws, Chapters 183A, 156B, 157 or 157B. Such recording shall be prima facie evidence of this exception notwithstanding any error or omission in regard thereto, and the Board shall have no authority to issue, and shall not issue, any certificate with regard to this exception.

1. Sale of Transfer After Removal. Once a removal permit has been issued, no additional removal permit is required for subsequent transfers of ownership; provided, however, that all subseqeunt owners shall be subject to the terms of this section and to the effective terms and conditions of any previously issued removal permit.

e. *Removal Procedure.*

1. Generally. A separate removal permit shall be issued for each qualifying housing accommodation. Copies thereof shall be kept on file at the Board and certified copies shall be available upon payment of a reasonable fee.

2. Criteria. In reviewing an application for a removal permit the Board shall consider relevant factors including, without limitation; the aggravation of the shortage of safe, decent and affordable housing accommodations in the City and its neighborhoods which may result from the removal, especially for tenants of low and moderate income, and handicapped or elderly tenants. In making such determination the Board shall review and make findings as to all relevant factors including, without limitation, the following:

(a) The benefits and detriments to the persons whom this section and this subsection seek to protect;

(b) The hardships imposed on the tenant[s] residing in the housing accommodation proposed to be removed;

(c) Circumstances demonstrating hardship and inequity to the applicant seeking a removal permit;

(d) The rate of vacancy in the City of Boston at the time the applicant applies for a removal permit;

(e) Substantiated evidence demonstrating the occurrence at the site of the housing accommodation of arson or a suspicious fire, as defined in subsection 10-2.15.

3. Mandatory Granting of Removal Permit.

(a) The Board shall grant a removal permit where the applicant demonstrates to the Board by sufficient evidence (i) that the applicant is in compliance with all the requirements of this section; and (ii) that tenants who occupy a majority of all of the units in a building or project and who have resided in the building or project for one (1) year or longer prior to the filing of the removal permit application:

(1) Have unequivocably agreed to purchase such building and convert it to a limited equity cooperative pursuant to General Laws, Chapters 156B, 157 and 157B; or

(2) Have unequivocably agreed to purchase their rental units when they are converted to a condominium or cooperative unit and have represented that they are intending in good faith to occupy such units as their principal and permanent residences.

(b) For purposes of determining a "majority" under the previous sub-paragraph, all occupied units in a building or project shall be included and voting shall be done by rental unit with all

of the tenants residing in a rental unit treated as a single tenant. All units in a building or project shall be offered for sale to the residing tenants at the same time, at the same or comparable price.

4. Conditions to be Imposed on Removal Permits. The Board shall impose the following conditions, if applicable, when it grants a removal permit. Nothing in this section shall restrict an owner from conveying his/her interest in any building or property or portion thereof provided that the property shall remain subject to the provisions of this section and to the conditions and terms of the last issued removal permit. Once issued, a removal permit shall not be revoked; however, the Board may subsequently modify the terms of a removal permit in accordance with the procedures set forth in paragraph e, 5(a)-(c) of this subsection, and may take such action as is necessary to enforce the terms of the removal permit, as provided in paragraph f. of this subsection.

(a) Right of First Refusal to Purchase. Any tenant who lives in a housing accommodation for which a removal permit has been granted shall, within sixty (60) days of the date of the grant of the permit or such other time period as shall be established by the Board, be given the right of first refusal to purchase the housing accommodation he/she occupies for substantially the same or more favorable terms and conditions as are being or would be offered to prospective arms length purchasers.

Such tenant may exercise a right of first refusal to purchase such housing accommodation by executing a purchase and sale agreement prior to the expiration of ninety (90) days after the date of receiving a copy of the purchase and sales agreement properly executed by the person offering the housing accommo-

dation for sale. Each time the housing is subsequently offered for sale, the tenant then occupying the housing accommodation shall be offered the right of first refusal to purchase as described above in this section.

(b) Code Compliance. At the time that a removal permit is granted the building must be in, and thereafter, remain in, full compliance with Article II of the State Sanitary Code, the State Building Code, the Boston Fire Prevention Code and any other applicable municipal code, ordinance, or state law, regulating the conditions or occupancy of housing accommodations. Notwithstanding the preceding sentence, if, for good cause, the building is not currently in compliance with any of the above codes, ordinances, or laws, the removal permit must be conditioned upon the applicant's agreement to bring the building and/or unit into such compliance within a specific time period determined reasonable by the applicable enforcement agency.

(c) Maintenance and Repairs. Whenever the housing accommodation is used for rental housing purposes, the owner must designate a person or persons within twenty-five (25) miles of the building to be responsible for maintenance and repairs. The tenant in each unit shall be informed by the owner or his/her agent in writing as to who is responsible for maintenance and repairs, both as to common and individual unit areas, and such notice shall be updated whenever there is a change in tenants or a change in who is responsible for such maintenance:

(d) Rent and Eviction Protections. The granting of a removal permit under this subsection shall not by itself operate to change the classification of the housing accommodation of controlled or vacancy decontrolled and the provisions of this

section as the decontrol under paragraph e. of the definition of "housing accommodation" in subsection 10-2.1 shall continue to be in full force and effect. Nothing herein, however, shall extinguish the right of a landlord after the granting of a removal permit to seek decontrol status of a housing accommodation which is voluntarily vacated within the meaning of said paragraph e. of the definition of "housing accommodation" in subsection 10-2.1.

5. Procedures.

(a) The Board shall consider an application for a removal permit for a controlled or decontrolled housing accommodation, or an application to modify the terms of a removal permit previously issued, upon receipt of an application filed by the landlord, owner or other authorized person. Such application shall be made on a form approved by the Administrator. The Board shall notify the applicant and tenant of the receipt of an application and of the right of either party to request a hearing in writing within fifteen (15) calendar days of the date of such notice. At any time, the Board may, on its own initiative, order a hearing on any application. If a hearing is timely requested by either party, or if the action is undertaken on the initiative of the Board, notice of the time and place of the hearing shall be furnished to the applicant and tenant and the hearing shall be conducted before a designee of the Board. Hearings, final decision and notification of the final decision to the applicant relative to permits shall occur within sixty (60) days of the filing of the request unless the parties otherwise agree. The Board may consolidate applications relating to housing accommodations in the same building or development. The Board may conduct a single hearing on all such consolidated applications. The Administrator may designate a person or persons to participate in a removal proceeding, where appro-

priate, in order to further the provisions and purposes of this section and to serve the public interest.

(b) Removal permit hearings shall be conducted in accordance with the provisions of Section 11 of Chapter 30A of the General Laws except that requirements (7) and (8) of such Section 11 shall not apply to such hearings.

(c) Notwithstanding any other provision of this section, if a decision regarding a removal permit has been made with regard to such controlled or decontrolled housing accommodation within the preceding twelve (12) months, the Board may, without holding a hearing, refuse to grant a removal permit for that housing accommodation or may dismiss any such application. In addition, if the application is not in conformance with the filing requirement of this section or applicable regulations, the Administrator may administratively dismiss such application without holding a hearing.

f. *Enforcement*. All of the remedies provided in subsections 10-2.16 through 10-2.19 of this section shall be available to the Board for purposes of enforcing subsection 10-2.11. (Ord. 1988 c. 9 § 8).

10-2.12 Permits for Removal/Conservations of Housing Accommodations in Lodging Houses and Rooming Houses.

a. *General Rule*. Notwithstanding any other Statute, Ordinance, Code or Law to the contrary, no person shall remove any occupied or vacant, controlled or decontrolled lodging house unit from actual or potential rental housing use, without first obtaining a removal/conversion permit from the Board. Such provisions shall apply whether or not there is a license for

such lodging house. The Board may establish reasonable regulations governing the criteria listed in part c. of this subsection and the procedures to be followed regarding application for an issuance of removal/conversion permits. Notwithstanding anything to the contrary contained herein, any lodging house unit, or any lodging house building or structure owned by an educational institution on or before March 30, 1988 and now or hereafter used by such educational institution for dormitory or student housing purposes shall be exempt from the removal permit requirement. Such use shall not constitute a removal.

Further, notwithstanding anything to the contrary contained herein, lodging house units which are newly constructed or converted to lodging house use after the effective date of this subsection 1 and which have not been rented or offered for rent previously as lodging house units shall be exempt from the lodging house removal permit requirement. Said exemption shall have no effect on the operation of all other ordinances and regulations.

b. *Definitions*. See definition for "Dormitory or Student Housing", "Lodging House" and "Lodging House Unit" in subsections 10-2.1

c. *Removal Permit Criteria*. The Board, in determining whether to grant or deny a Removal/ Conversion Permit shall consider the aggravation of the shortage of safe, decent and affordable rental housing units, especially lodging house units, in the City and its neighborhoods which may result from the removal/conversion, especially for low to moderate income, handicapped or elderly tenants.

1. In making such determination, the Board, in its discretion, shall make findings on any or all of the following factors:

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[1] **Editor's Note:** This subsection (ordinance) was adopted by the City Council on May 4, 1988 and approved by the Mayor on May 20, 1988.

(a) The benefits and detriments to the persons whom the ordinance and this subsection seek to protect;

(b) The hardships imposed on the tenant[s] residing in the lodging house units proposed to be removed or converted;

(c) Circumstances demonstrating hardship and inequity to the applicant seeking a permit;

(d) The rate of vacancy in the City of Boston at the time the applicant applies for a permit;

(e) Whether the majority of the tenants are elderly, as defined in subsection 10-2.1 or handicapped, as defined in subsection 10-2.1 or low or moderate income as defined in subsection 10-2.1 or low income as defined in subsection 10-2.1;

(f) Any other relevant factors.

(2) Any Removal/Conversion Permit granted by the Board may be subject to such terms and conditions which the Board may require in furtherance of the purposes of the subsection.

d. *Hearings*. Removal/conversion hearing shall be conducted in accordance with the provisions of Section 11 of Chapter 30A of the General Laws except that requirements (7) and (8) of such Section 11 shall not apply to such hearings.

e. *Judicial Review*. All decisions of the Board with regard to removal/conversion permits may be appealed to the District Court Department of the Trial Court for the judicial district within which the housing accommodation is located or the Housing Court Department of the Trial Court, City of Boston Division, within thirty (30) days after the notice of such decision.

f. *Enforcement.*

1. The Superior Court Department of the Trial Court and the Housing Court Department of the Trial Court, City of Boston, shall severally have jurisdiction to enforce the provisions of this subsection and any rules and regulations promulgated pursuant to this subsection, and may restrain or enjoin violations of this subsection.

(2) The Rent Equity Board shall give notice of a hearing within fourteen (14) days from the filing of a petition for a removal permit and shall hold a removal permit hearing within thirty (30) days from the date of the filing of the petition. The Rent Board shall make a decision within forty-five (45) days from the filing of the petition. Should the Rent Board fail to meet the schedule set forth herein, parties may seek an order from the Superior Court or the Housing Court Department of the Trial Court, City of Boston Division requesting an order that the Rent Equity Board make an expedited determination of the petition. Upon finding that the Rent Board has failed to comply with the schedule set forth herein, the court shall order an expedited hearing and determination of the petition.

g. Transition. All actions, cases, Board decisions decided or pending under the June 16, 1987 Amendment entitled "PERMITS FOR REMOVAL/CONVERSION OF HOUSING ACCOMMODATIONS IN LODGING AND ROOMING HOUSES" shall be governed as provided for in this subsection:

1. All decisions rendered by the Board under the provisions of June 16, 1987 Amendment shall remain in full force and effect under the provisions of this Amendment.

2. All matters pending before the Board as of the effective date of this subsection[1] shall remain in full force and effect but shall be processed in accordance with the provisions of this Amendment.

3. The provisions of the June 16, 1987 Amendment, shall be treated as remaining in force and effect for the purpose of sustaining in court any proper suit, action or prosecution with respect to any right, liability or offense arising under such Amendment. However, any such suit, action or prosecution shall be processed under the provisions of this Amendment.

h. *Effective Date*. This Amendment to Chapter 34 of the Ordinances of 1984[2] shall be effective immediately upon passage. Matters decided by or pending before the Board and matters decided or pending in Court shall be treated in accordance with part g.

i. *Severability*. The provisions of this Amendment and the Ordinance it amends (Section 10-2 of the City of Boston Code, Ordinances) shall be severable and if any one or more provisions, or parts or subparts thereof, shall be held unconstitutional or otherwise invalid by any court of competent jurisdiction the decision of such court shall not affect or impair any of the remaining provisions or parts thereof. (Ord. 1987 c. 6 § 5; Ord. 1988 c. 4 § (i)-(iii); Ord. 1988 c. 7 § 1).

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[1] **Editor's Note:** This subsection (ordinance) was adopted by the City Council on May 4, 1988 and approved by the Mayor on May 20, 1988.

[2] **Editor's Note:** Chapter 34 of the Ordinance of 1984 is codified as Section 10-2.

10-2.13 Permits for Removal of Mobile Home Accommodations in Mobile Home Parks.

a. *Removal Permits Required.*

1. It shall be unlawful for an owner of a mobile home park to remove any mobile home accommodation in a mobile home park or discontinue the use of part or all of the land owned and licensed as a mobile home park without having first obtained a mobile home removal permit from the Rent Equity Board subject to the provision contained herein.

2. Such provisions shall apply whether or not the license for such premises is still in effect. The Board may establish reasonable regulations governing the criteria and the procedures to be followed regarding application for and issuance of mobile home removal permits.

b. *Permit Criteria.* In determining whether to grant a removal permit, the Board shall consider the aggravation of the shortage of safe, decent and affordable mobile home park accommodations in Boston, which may result from the discontinuance of use as a mobile home park, especially for tenants of low or moderate income or elderly persons on fixed incomes. In making such a determination the Board shall review and make findings as to all relevant factors including, without limitation, the following:

1. The benefits and detriments to the persons whom this subsection seeks to protect;

2. The hardships imposed on the tenant[s] residing in the controlled or decontrolled unit proposed to be removed;

3. Circumstances demonstrating hardship and inequity to the applicant seeking a mobile home removal permit;

4. The rate of vacancy in the City of Boston at the time of the applicant applies for a mobile home removal permit.

c. *Removal Procedure.*

1. The Board shall consider an application for a mobile home removal permit for a mobile home park upon receipt of an application filed by the landlord or other authorized person.

2. The Board shall schedule a public hearing within sixty (60) days of receipt of the application. The Board shall notify the applicant and all residents of the mobile home park of the hearing.

3. The mobile home removal permit hearings shall be conducted in accordance with the provisions of Section 11 of Chapter 30A of the General Laws except that requirements (7) and (8) of such Section 11 shall not apply to such hearings.

4. The provisions of Section Five (ii), (iii) and (iv) of Chapter 6, the Ordinances of 1986 shall apply to such hearings.[1] (Ord. 1987 c. 12 § 13; Ord. 1988 c. 9 § 9).

10-2.14 Duties of the Board.

Certified copies of all policies, rules, and regulations of the Board shall be forwarded to the City Clerk who shall forward them forthwith to the City Council. (Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 11; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33).

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[1] **Editor's Note:** Chapter 6 of the Ordinances of 1987, Section 5, is codified as subsection 10-2.12.

10-2.15 Suspicious Fires.

In the event that any owner of property under conversion to condominiums or cooperatives suffers loss in three (3) or more such properties because of fire, the records of the Building Department and the Assessing Department shall indicate such conditions by the addition of the plans, maps, printouts, and records of the City of the words "loss by fire" on the affected structures. Any fire in a unit undergoing conversion determined by the Fire Commissioner to be a suspicious origin shall be identified in said plans, maps, printouts, and records by the addition of the words "suspicious fire."
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 12; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33).

10-2.16 Civil Remedies.

a. Any person who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this section, or any rule, regulation or order hereunder promulgated, shall be liable as hereinafter provided to the person from whom such payment is demanded, accepted, received, or retained, or to the City for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of one hundred ($100.00) dollars, or not more than three (3) times the amount by which the payment or payments demanded, accepted, received, or retained exceed the maximum rent which could be lawfully demanded, accepted, received, or retained, whichever is the greater; provided, however, that if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation, the amount of such liquidated damages shall be the amount of the overcharge or overcharges.

b. If the person from whom such payment is demanded, accepted, received, or retained in violation of the provisions of this section or any rule, regulation, or order hereunder promulgated, fails to bring an action under this section within thirty (30) calendar days from the date of the occurrences of the violation, the Board may settle the claim arising out of the violation or bring such action upon its own initiative. Settlement by the Board shall thereafter bar any other person from bringing action for the violation or violations with regard to which a settlement has been reached. In the event the Board settles said claim, it shall be entitled to retain the costs it incurred in the settlement thereof, and the person against whom the violation has been committed shall be entitled to the remainder. In the event the City initiates action pursuant to the provisions of this subsection, it shall be entitled to receive attorneys' fees and costs pursuant to the provisions of paragraph a. and the person against whom the violation was committed shall be awarded liquidated damages pursuant to the provisions of said paragraph a.

c. A judgment for damages or on the merits in any action initiated pursuant to this subsection shall be a bar to any recovery pursuant to this subsection or in any other action against the same defendant on account of any violation with respect to the same person prior to the initiation of the action in which such judgment was rendered. Action to recover liquidated damages pursuant to the provisions of this subsection shall not be brought later than one year after the date of violation. A single action for damages pursuant to the provisions of this subsection may include all violations of the provisions of this subsection committed by the same defendant against the same person.

d. The District Court Department of the Trial Courts for the judicial district within which the housing accommodation

affected is located and the Housing Court Department of the Trial Courts, City of Boston Division, shall severally have concurrent original jurisdiction over all accounts and complaints initiated pursuant to this subsection.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 13; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33).

10-2.17 Criminal Penalties.

a. It shall be unlawful for any person to demand, accept, receive, or retain any rent for the use or occupancy of any housing accommodation in excess of the maximum rent prescribed therefor pursuant to the provisions of this section or any rule, regulation or order hereunder promulgated, or otherwise to do or omit to do any action in violation of the provisions of this section or the rules, regulations or orders hereunder promulgated. It shall be unlawful for any person by act or omission knowingly to engage in any conduct tending to deprive a tenant of, or to prevent a tenant from exercising, any right conferred by this section, including without limitation, any such conduct tending to deprive a tenant of the peace, comfort, or enjoyment of a housing accommodation in violation of this section and any such conduct intended to result in substantial inconvenience or amounting to a violation of privacy, harassment, intimidation, threat, or coercion.

(b) It shall be unlawful for any person to demand, accept, receive, or retain any payment which exceeds the maximum lawful rent for one month as a finder's fee or service charge for the opportunity to examine or lease any housing accommodation; provided, however, no finder's fee or service charge shall be lawful unless the person from whom the payment is demanded, accepted, received or retained actually rents or

leases the housing accommodation with regard to which payment of said fee or said charge has been demanded, accepted, received or retained.

c. Whoever willfully violates any provision of this section or any rule, regulation or order hereunder promulgated or whoever knowingly makes any false statement in any testimony before the Board or whoever knowingly supplies any false information or knowingly makes false statement to, or files a false affidavit with, the Board shall be punished by a fine of not more than five hundred ($500.00) dollars or by imprisonment for not more than ninety (90) days or both; provided, however, that in the case of a second or subsequent offense, such person shall be punished by a fine of not more than three thousand ($3,000.00) dollars or by imprisonment for not more than one year or both.

d. The District Court Department of the Trial Courts for the Judicial District within which the housing accommodation affected is located and the Housing Court Department of the Trial Courts, City of Boston Division, shall severally have concurrent jurisdiction over all such actions and complaints. (Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 14; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33).

10-1.18 Judicial Review.

All decisions of the Board, except as otherwise provided in this subsection, may be appealed to the District Court Department of the Trial Courts for the judicial district within which the housing accommodation is located or to the Housing Court Department of the Trial Courts, City of Boston Division, within thirty (30) calendar days after the date of such decision; pro-

vided, however, that this section shall not be construed to provide a right of appeal of a general adjustment decision pursuant to subsection 10-2.5a.

(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 15; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33).

10-2.19 Injunctions.

The Superior Court Department of the Trial Courts and the Housing Court Department of the Trial Courts, City of Boston Division, shall severally have jurisdiction to restrain by injunction any violation of this section or any rule, regulation, or order hereunder promulgated.

(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 16; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33).

10-2.20 Effective Date and Duration.

This section shall become effective as of the date signed by the Mayor and shall remain in effect until December 31, 2004 or until a prior determination by the Mayor and City Council that the present rental housing emergency no longer exists.

(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 17; Ord. 1969 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33).

10-2.21 Constitutional Construction.

The provisions of this section are severable, and if any of its provisions shall be held unconstitutional or otherwise invalid by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 18; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33; Ord. 1993 c. 7).

10-2.22 Transitional Provisions.

a. *Scope.* Repeal of Chapter 1. Except as otherwise provided herein, Chapter 1 of the Ordinances of 1983, as amended, is hereby repealed as of the effective date of this ordinance. All matters initiated under Chapter 1 which are pending before or decided by the Board, or pending before any court, or any valid condominium or cooperative conversion eviction notice or related offer, or additional year notice ruling initiated under the provisions of Chapter 1 or any rule, regulation or order thereunder promulgated shall be governed as provided for in this subsection.

b. *Notices Sent and Matters Pending Before or Decided by the Board.*

1. All decisions rendered by the Board under the provisions of Chapter 1 of the Ordinances of 1983, as amended, shall remain in full force and effect under the provisions of this section.

2. Notwithstanding any provisions of this section to the contrary, all matters pending before the Board as of the effective date of this section shall remain in full force and effect but shall be processed in accordance with the provisions of this section.

3. The provisions of said Chapter 1 of the Ordinances of 1983, as amended, shall be treated as remaining in force and effect for the purpose of sustaining in court any proper suit,

action or prosecution with respect to any right, liability or offense arising under such section.

4. All valid condominium or cooperative conversion eviction notices or related offers given prior to October 3, 1984 pursuant to Chapter 1 of the Ordinances of 1983, as amended, and the applicable regulations thereunder, shall be treated as remaining in full force and effect where such notices or offers comply with the provisions of said Chapter 1 of the Ordinances of 1983, as amended.

(a) Condominium or cooperative conversion eviction notices or related offers given pursuant to Chapter 1 of the Ordinances of 1983 to tenants qualifying as low income, low or moderate income elderly, or low or moderate income handicapped under the provisions of this ordinance on the date such notice or offer was received shall be null and void and those tenants shall be entitled to the eviction ban protections of subsection 10-2.10f. of this section.

(b) The provisions of paragraph (a) above shall not apply where prior to October 3, 1984 a binding purchase and sales agreement has been executed for a specific unit and a deed has been duly recorded transferring title of such unit to an owner who certifies under oath to the Board within forty-five (45) days of the effective date of this ordinance that he or she intends to occupy the unit as his or her permanent residence. If any person so certifying shall fail to occupy said unit as his or her principal residence and place of domicile within ninety (90) days of the date the unit becomes vacant, such failure shall be determined an unfair and deceptive practice and a violation of this Chapter. Whoever willfully and falsely certifies that they intend to be an owner occupant, under the provisions of this subsection, shall be subject to a fine of two

hundred ($200.00) dollars per day for each day the offense exists or by imprisonment for a period of not to exceed one (1) year or both.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 19; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33; Ord. 1985 c. 5 § 1).

10-2.23 Renumbering Allowed by City Clerk.

The sections of this ordinance and references thereto may be renumbered by the City Clerk for the purpose only of conforming it to the City of Boston Code.
(Ord. 1972 c. 19; Ord. 1974 c. 13; CBC 1975 Ord. T10 § 20; Ord. 1979 cs. 29, 37; Ord. 1981 c. 8; Ord. 1982 cs. 15, 16, 17, 26, 37; Ord. 1983 cs. 1, 9, 17, 23, 33; Ord. 1984 cs. 1, 7, 29-34).

A true copy City of Boston Code, Ordinances.
Chapter 10, Section 2-2.23.

Attest

_____

City Clerk

APPENDIX B.

[DOCUMENT NO. 66 – 1984]

ORDINANCES OF 1984, CHAPTER 34

REGULATING CERTAIN RESIDENTIAL RENTS, EVICTIONS, AND CONVERSIONS ("Rental Housing Equity Ordinance").

In the Year Nineteen Hundred and Eighty-four

Be it ordained by the City Council of Boston, as follows:

Chapter 1 of the Ordinance of 1983, as amended most recently by the City Council on October 3 and October 17, 1984, is hereby repealed, and replaced with the following new language:

Whereas, A serious public emergency exists with respect to the housing of a substantial number of residents of the City of Boston, particularly those who are elderly, handicapped, and who have low or moderate annual incomes; and

Whereas, The deterioration and demolition of existing housing is a significant problem which has not been solved by the construction or substantial rehabilitation of housing, leaving many citizens of the city, particularly those who are elderly, handicapped, or who have low or moderate annual incomes, without sufficient access to safe, decent, and reasonably priced rental housing accommodations; and

Whereas, The imposition of controls upon rents, evictions, and the conversion of existing rental housing to condominium or cooperative ownership may restrict the incentives necessary to insure private investment in the modernization and rehabilitation of existing housing and the contruction of new, nonsubsidized housing; and

Whereas, Homeownership creates an interest in real estate which tends to contribute to the maintenance and preservation of housing and to an increase in real estate taxes which has a salutary effect upon the City of Boston and its residents, and the City Council should, therefore, encourage an increase in such ownership; and

Whereas, At present in the City of Boston there is conversion of multiple unit rental housing occupied by tenants to condominium or cooperative units occupied by individual owners thereof; and

Whereas, Notwithstanding the general good accomplished by such increase in homeownership, many people of limited means, particularly, but not limited to, the elderly and the handicapped, may have difficulty in obtaining alternative rental housing at prices which they can afford when evicted for a condominium or cooperative conversion; and

Whereas, The untoward effects of condominium and cooperative conversion evictions on tenants who are not elderly, handicapped or of low income can adequately be mitigated by providing potentially displaced tenants with sufficient time to examine the housing market, evaluate available housing alternatives, formulate future housing plans, and by requiring those owners of multiple unit rental housing who convert to condominiums or cooperatives to provide meaningful assistance to such tenants; and

Whereas, It is in the interest of the City of Boston and its residents for the City Council to protect the mutuality of interest between the city's tenants and landlords by controlling rents

and evictions and conversions of existing rental housing units to condominiums or cooperative ownership in a fashion which prevents arbitrary and capricious increases in rents, evictions without just cause, and displacement of tenants whose choices of housing accommodations are limited, and to do so in a fashion which will stimulate investment in the modernization and rehabilitation of the city's existing stock of rental housing and in new rental housing construction;

Now, Therefore, pursuant to the authority vested in it by law, including, without limitation, Article 2, as amended, and Article 47 of the Amendments to the Constitution of the Commonwealth of Massachusetts and chapter 797 of the Acts of 1969, as amended by chapter 863 of the Acts of 1970 and by chapter 843 of the Acts of 1971, be it declared by the City Council of the City of Boston that a substantial and critical shortage of safe, decent, and reasonably priced rental housing units exists, particularly for those who are elderly, handicapped or who have low or moderate annual incomes, because of deterioration and demolition of existing housing and an insufficient supply of new housing, and that the ordinances which are now in effect which were designed to correct this shortage must be revised and extended in order for the city to fulfill its responsibility for ameliorating this shortage in a fashion which balances the interests between tenants and landlords fairly and equitably; and, also,

Pursuant to the same authority the following is declared to be in the public interest:

APPENDIX C.

CHAP. 797 AN ACT CONFIRMING THE AUTHORITY OF THE CITY COUNCIL OF THE CITY OF BOSTON TO IMPOSE A RENT CONTROL LAW IN THE CITY OF BOSTON.

Whereas, The general court finds and declares that a serious public emergency exists with respect to the housing of a substantial number of the citizens in the city of Boston, which emergency has resulted in a substantial shortage of rental housing accommodations; that, unless residential rents and eviction of tenants are regulated and controlled, such emergency and the inflationary pressures resulting therefrom will produce serious threats to the public health, safety and general welfare of the citizens of said city; that such emergency should be met by the commonwealth immediately and with due regard for the rights and responsibilities of the city of Boston.

Be it enacted, etc., as follows:

Notwithstanding any provision of law to the contrary, when public exigency, emergency or distress exists in the city of Boston, the city council of said city, with the approval of the mayor, may by ordinance, control the rent for the use or occupancy of housing accommodations in structures having four or more dwelling units, excluding motels, hotels or inns, and may create a rent board and empower it to establish as the maximum rent for housing accommodations in the city of Boston the rent in effect therefor on the first day of December, nineteen hundred and sixty-eight, or such higher amount as may be necessary to remove hardships or correct inequities. Upon a decision by the official city of Boston agency concerned with the regulation of the rents in a housing accommodation after proper hearing, either party concerned may appeal to the district court within the jurisdiction of the location of that housing accommodation.

Approved August 24, 1969.

APPENDIX D.

CHAP. 863 AN ACT RELATIVE TO THE CONTROL OF RENTS AND EVICTIONS IN THE CITY OF BOSTON.

Be it enacted, etc., as follows:

SECTION 1. The general court finds and declares that a serious public emergency declared in chapter seven hundred and ninety-seven of the acts of nineteen hundred and sixty-nine continues to exist in the city of Boston with respect to the housing of a substantial number of the citizens of said city, which emergency continues to be marked by a substantial shortage or rental housing accommodations; that, unless residential rents continue to be regulated and controlled and unless evictions of tenants are regulated and controlled, such emergency and the inflationary pressures resulting therefrom will produce serious threats to the public health, safety and general welfare of the citizens of said city; and that such emergency should be met immediately with due regard to for the rights and responsibilities of the city of Boston.

SECTION 2. Chapter 797 of the acts of 1969 is hereby amended by striking out the first sentence and inserting in place thereof the following sentences: — So long as the current public exigency, emergency or distress continues in the city of Boston, said city may by ordinance control the rent for the use or occupancy of housing accommodations in structures having three or more dwelling units, excluding motels, hotels or inns, and excluding housing accommodations in structures having three dwelling units one of which is occupied by the owner thereof as his permanent residence, and may create a board and empower it to establish as the maximum rent for such housing accommodations the rent in effect therefor on December the first, nineteen hundred and sixty-eight; provided, however, that said ordinance shall authorize the board, by order, to make such individual adjustments in such maximum rents as may be necessary to remove hardships or to correct

other inequities, and may authorize the board by regulation to make such general adjustments in such maximum rents as may be necessary to remove hardships or to correct other inequities. In making individual and general adjustments to remove hardships or to correct other inequities, said board shall observe the principle of maintaining maximum rents for such housing accommodations at levels which will yield to landlords a fair net operating income from such housing accommodations. In determining whether the maximum rent for such housing accommodations yields a fair net operating income from such housing accommodations, due consideration shall be given to the following, among other relevant factors: (1) increases in property taxes; (2) unavoidable increases in operating and maintenance expenses; (3) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement and maintenance; (4) increases or decreases in living space, services, furniture, furnishings or equipment; and (5) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement or maintenance.

SECTION 3. Said chapter 797 is hereby further amended by adding the following paragraphs: —

Such ordinance may also provide that: (*a*) No person shall bring any action to recover possession of a housing accommodation unless:

(1) the tenant has failed to pay the rent to which the landlord is entitled;

(2) the tenant has violated an obligation or covenant of his tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord;

(3) the tenant is committing or permitting to exist a nuisance in, or is causing substantial damage to, the housing accommodation, or is creating a substantial interference with the comfort,

safety, or enjoyment of the landlord or other occupants of the same or any adjacent accommodation;

(4) the tenant is convicted of using or permitting a housing accommodation to be used for any illegal purpose;

(5) the tenant, who had a written lease or rental agreement which terminated on or after the passage of this act has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this act;

(6) the tenant has refused the landlord reasonable access to the housing accommodation for the purpose of making necessary repairs or improvements required by the laws of the United States, the commonwealth, or any subdivision thereof, or for the purpose of inspection as permitted or required by the lease or by law, or for the purpose of showing the housing accommodation to any prospective purchaser or mortgagee;

(7) the tenant holding at the end of a lease term is a subtenant not approved by the landlord;

(8) the landlord seeks to recover possession in good faith for use and occupancy of himself, or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law;

(9) the landlord seeks to recover possession to demolish or otherwise remove the housing accommodations from housing use;

(10) the landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purposes of this act.

(*b*) A landlord seeking to recover possession of a housing accommodation shall apply to the board for a certificate of eviction. Upon receipt of such an application, the board shall send a copy of the petition to the tenant of the housing accommodation together with a notification of all rights and proce-

dures available under this section. If the board finds that the facts attested to in the landlord's petition are valid and in compliance with paragraph (a), the certificate of eviction shall be issued. Any application for a certificate of eviction shall be deemed to have been granted unless denied by the board within thirty days of such application or such shorter period as may be determined by ordinance.

(*c*) A landlord who seeks to recover possession of a housing accommodation without a certificate of eviction shall be deemed to have violated such ordinance, and the board shall initiate a criminal prosecution for such violation.

Notwithstanding the provisions of this section the United States, the commonwealth or any agency or political subdivision thereof may maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action or proceeding is authorized by the statute or regulation under which such accommodations are administered.

The provisions of this section shall be construed as additional restrictions on the right to recover possession of a housing accommodation. No provision of this section shall entitle any person to recover possession of such a housing accommodation. Upon a decision of said board concerning the granting or withholding of a certificate of eviction, either party concerned may appeal to the district court within the jurisdiction of which the housing accommodation involved is located.

Civil Remedies. (*a*) Any person who demands, accepts, receives or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this act or any regulation, order or ordinance hereunder promulgated, shall be liable as hereinafter provided to the person from whom such payment is demanded, accepted, received or retained, or to the city for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the

amount of one hundred dollars, or not more than three times the amount by which the payment or payments demanded, accepted, received or retained exceed the maximum rent which could be lawfully demanded, accepted, received or retained, whichever is the greater; provided that if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation, the amount of such liquidated damages shall be the amount of the overcharge or overcharges.

(*b*) If the person from whom such payment is demanded, accepted, received or retained in violation of the provisions of this act or any rule, regulation or ordinance hereunder promulgated fails to bring an action under this section within thirty days from the date of the occurrence of the violation, the board may settle the claim arising out of the violation or bring such action. Settlement by the board shall thereafter bar any other person from bringing action for the violation or violations with regard to which a settlement has been reached. In the event the board settles such claim, it shall be entitled to retain the costs it incurred in the settlement thereof, and the person against whom the violation has been committed shall be entitled to the remainder. In the event the city brings action under the provisions of this section, it shall be entitled to receive attorney's fees and costs under the provisions of paragraph (*a*) and the person against whom the violation was committed shall be awarded liquidated damages under the provisions of said paragraph (*a*).

(*c*) A judgment for damages or on the merits in any action under this section shall be a bar to any recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered. Action to recover liquidated damages under the provisions of this section shall not be brought later than one year

after the date of the violation. A single action for damages under the provisions of this section may include all violations of the provisions of this section committed by the same defendant against the same person.

Criminal Penalties. (*a*) It shall be unlawful for any person to demand, accept, receive or retain any rent for the use or occupancy of any housing accommodations in excess of the maximum rent prescribed therefor under the provisions of this act or the orders, regulations or ordinance hereunder promulgated, or otherwise to do or omit to do any action in violation of the provisions of this act or the orders, regulations or ordinance hereunder promulgated.

(*b* It shall be unlawful for any person to demand, accept, receive or retain any payment which exceeds the maximum lawful rent for one month as a finder's fee or service charge for the opportunity to examine or lease any housing accommodation and no finder's fee or service charge shall be lawful unless the person from whom the payment is demanded, accepted, received or retained actually rents or leases the housing accommodation with regard to which payment of said fee or said charge has been demanded, accepted, received or retained.

(*c*) Whoever willfully violates any provision of this act or any rule, regulation or ordinance hereunder promulgated or whoever knowingly makes any false statement in any testimony before the board or whoever knowingly supplies the board with any false information shall be punished by a fine of not more than five hundred dollars or by imprisonment in the case of a second or subsequent offense, such person shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than one year or both. The district court for the judicial district within the housing accommodation affected is located shall have exclusive original jurisdiction over all such actions and complaints.

The superior court shall have jurisdiction in equity to restrain by injunction any violation of this act and ordinances adopted hereunder and rules, regulations and orders promulgated by the board provided for by this act.

The provisions of this act are severable, and if any of its provisions shall be held unconstitutional or otherwise invalid by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

Approved August 31, 1970.

APPENDIX E.

CHAPTER 45 AN ACT GRANTING THE CITY OF BOSTON AUTHORITY TO REGULATE CONDOMINIUM AND COOPERATIVE CONVERSIONS.

Be it enacted, etc., as follows:

SECTION 1. The General Court finds and declares that the serious public emergency declared in chapter seven hundred and ninety-seven of the acts of nineteen hundred and sixty-nine continues to exist in the city of Boston with respect to the housing of a substantial number of the citizens of said city, which emergency has resulted in a substantial shortage of safe, decent, and reasonably priced rental housing accommodations in the city of Boston, particularly for those who are elderly, handicapped, or who have low or moderate annual incomes; and that such emergency has been particularly exacerbated because of deterioration and demolition of existing housing and an insufficiency supply of new housing, and due, further, to the conversion of rental housing units to other uses or forms of ownership, particularly conversion to condominiums or cooperatives and the resulting increases in rent, displacement of tenants or loss of rental housing stock; and that unless the demolition of existing housing and the conversion of rental housing accommodations to other forms of use or ownership are further regulated and controlled, such emergency and the inflationary pressures resulting therefrom will produce serious threats to the public health, safety and general welfare of the citizens of said city; and that such emergency should be met immediately and with due regard for the rights and responsibilities of said city of Boston; and, therefore, this act is declared to be in the public interest.

SECTION 2. Chapter 797 of the acts of 1969, as most recently amended by section 26 of chapter 843 of the acts of 1971, is hereby further amended by adding the following of five paragraphs: —

(a) Notwithstanding the provisions of any general or special law to the contrary, including, without limitation, the provisions of chapter six hundred and sixty-five of the acts of nineteen hundred and fifty-six, and the provisions of General Law chapters one hundred and fifty-six B, one hundred and fifty-seven, and one hundred and eighty-three A, the city of Boston may, by ordinance, further regulate and control the removal of housing accommodations from rental housing use, the reduction in the total number of units in a housing accommodation, or the change in form of ownership of housing accommodations used for rental housing. Such regulations and controls may include, without limitation the authority to:

(i) require that no person shall remove a housing accommodation from rental housing use without first obtaining a permit for that purpose from the board. Such permit may be subject to such terms and conditions not inconsistent with the purposes and provisions of this act;

(ii) require that no person shall convert any housing accommodation to a condominium or cooperative without first obtaining a permit for that purpose from the board; and

(iii) regulate evictions relating to the conversion of housing accommodations to condominium or cooperative subject to such terms and conditions not inconsistent with the purposes and provisiosn of this act.

(b) The city of Boston, in any ordinance adopted pursuant to this act, shall be empowered to promulgate any rules, regulations or orders, not inconsistent with the purposes and provisions of this act, for the enforcement of this act, for the granting or denying of removal permits or for the regulation of such evictions.

(c) Any hearings, regarding matters related to removal permits or evictions shall be conducted by the board in accordance with the provisions of section eleven of chapter thirty A of the General Laws except that requirements (7) and (8) of such section eleven shall not apply to such hearings.

(d) All decisions of the board may be appealed to the district court department of the trial court for the judicial district within which the housing accommodation is located or the housing court department of the trial court, city of Boston division, within thirty calendar days after the notice of such decision.

(e) The superior court department of the trial court and the housing court department of the trial court, city of Boston division, shall severally have jurisdiction to enforce the provisions of this act, any ordinance adopted hereunder and any rules and regulations promulgated pursuant to such ordinance, and may restrain or enjoin violations of such ordinance.

SECTION 3. Chapter 652 of the act of 1960 is hereby amended by inserting after section 14A, as inserted by chapter 488 of the acts of 1967, the following section: —

Section 14B. The conversion of the form of ownership from rental property to condominium or cooperative ownership, of one or more buildings or parts of buildings in a land assembly and redevelopment plan area or in an urban renewal project undertaken in the city of Boston, pursuant to chapter one hundred and twenty-one B of the General Laws, by the Charles River Park "B" Company at Whittier Place, Boston, shall be permitted to stand without the rescission of the sale of individual condominium units, notwithstanding that such conversion may be deemed a modification of the land assembly and redevelopment plan or the urban renewal plan for such project and was thereby required to receive the approval of the Boston Redevelopment Authority, which approval was not sought; provided, however, that the provisions of this section shall exclusively be applicable to a certain class of residents and their specifically listed units known as Isaac Lyumkis, et al, unit purchasers at said Whittier Place, Boston. Said class of residents and specific units listed on a document known as

"Whittier Place Unit Purchasers", Exhibit "I", attached hereto and incorporated by reference. Any such conversion of ownership shall, however, be subject to all applicable provisions of law.

SECTION 4. This act shall take effect upon its passage.

Approved May 6, 1987.

APPENDIX F.

December 10, 1991

Mr. James R. Creamer
Chief Compliance Officer
City of Boston
Rent Equity Board
Boston City Hall
Room 709
One City Hall Plaza
Boston, Massachusetts 02201

Mr. John Dubois
Hearing Officer
City of Boston
Rent Equity Board
Boston City Hall
Room 709
One City Hall Plaza
Boston, Massachusetts 02201

Re: City of Boston, Rent Equity Board
July 25, 1991 Notice of Non-Registration of Rent Controlled Property
Docket No.: C-91-136
Address: 129 Putnam Street, East Boston, MA
Landlord: Resolution Trust Corporation, as Receiver of ComFed Savings Bank, F.A.

Dear Messrs. Creamer and DuBois:

This is in response to the City of Boston, Rent Equity Board's ("Board") July 25, 1991 "Notice of Non-Registration of Rent Controlled Property" for the property located at 129 Putnam Street, East Boston, Massachusetts (the "Property").

Please be advised that the Office of Thrift Supervision ("OTS"), by Resolution Number 91-50, dated January 31, 1991, appointed the Resolution Trust Corporation ("RTC") as receiver ("Receiver") for ComFed Savings Bank (the "Old Association"). The Receiver took possession of the Old Association on January 31, 1991, and succeeded to all the rights, titles, powers and privileges of the Old Association. As provided in Resolution Number 91-50, the OTS, pursuant to the request of the RTC as Receiver, issued a new federal

mutual savings association charter to ComFed Savings Bank, F.A. (the "New Association"), and approved the transfer of such assets and liabilities of the Old Association to the New Association. Resolution Number 91-50 concurrently appointed the RTC as Conservator ("Conservator") for the New Association.

Pursuant to Section 5(d)(2)(H)(ii) of the Home Owner's Loan Act of 1933, as amended by Section 301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") the RTC, as Receiver, took possession of the New Association on September 13, 1991, and succeeded to all the rights, title, powers and privileges of the Conservator and the New Association. The undersigned has been appointed Field Site Manager for this Receivership. One of the assets of the Receivership is the Property.

Because the RTC, as Receiver, derives its powers pursuant to FIRREA and thereby, the Supremacy Clause of the United States Constitution, the Rent Equity Board Ordinance, Chapter 34 of the Ordinances of 1984, is inapplicable to the RTC. The Board is, therefore, without jurisdiction over the RTC in this matter and real property owned by the RTC by virtue of FIRREA. The statute itself is clear on this point. 12 U.S.C. § 1821(c)(2)(c) (1989). Statements made to the contrary in Joel H. Pasternak's July 16, 1991 letter to John DuBois are in error and we wanted to alert you to that error.

Nonetheless, the RTC is committed to protecting the concerns of low and moderate income tenants. In this regard, the RTC has voluntarily adopted a Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulation ("Statement of Policy") which sets forth certain self-imposed restrictions on rent increases and evictions of low and moderate income tenants — defined as individual or families with incomes no greater than 115% of median area income. A copy of the Statement of Policy will be sent to you under separate cover.

The RTC is also committed to insuring that the health and safety of the tenants of the Property, as well as other RTC-owned properties, is maintained at acceptable levels. Consequently, the RTC will observe applicable health standards to the best of its ability.

In short, while the RTC, as Conservator or Receiver, cannot comply with the Board's request to register the Property, please be assured that the RTC will continue to act responsibly with respect to the tenants of rent controlled units in its possession.

Very truly yours,

_____

Joseph Harrison
Field Site Manager

cc: Joel H. Pasternak
A. Neil Hartzell, Esquire
Raymond A. Yost, Esquire

APPENDIX G.

GREATER BOSTON LEGAL SERVICES
622 Washington Street
Dorchester, Massachusetts 02124
617 265-1808
FAX 825-1389

June 28, 1993

James R. Creamer
Chief Compliance Officer
Boston Rent Equity Board
Boston City Hall
Room 709
Boston, MA 02201

Re: Tony Wellington, 20 Irma Street, Dorchester, MA 02124

Dear Jim:

I am enclosing a copy of a notice to quit that my client received from the RTC some weeks ago. Kathy Palmer suggested I send you a copy.

If you could talk to any contacts you may have with the RTC to encourage them to discontinue this case, I would greatly appreciate it. If RTC will not drop the action, I will file a compliance complaint on behalf of my client. Feel free to call and thanks in advance.

Sincerely,

_____

Joel Feldman

cc: Tony Wellington

May 18, 1993

30 - DAY NOTICE TO VACATE PREMISES

To: Estella White or Mr./Ms. Alvarado or Mr./Ms. Salgado or Mr./Ms. Wellington or Current Occupant
20 Irma Street, Third Floor
Dorchester, MA

From: Resolution Trust Corporation as Receiver for
Home Owners Savings Bank F.S.B.
1000 Adams Avenue
Norristown, Pennsylvania

You are hereby notified that Resolution Trust Corporation as Receiver for Home Owners Savings Bank F.S.B. by entry of foreclosure is the legal owner of the subject premises at 20 Irma Street, Third Floor, Dorchester, MA and thereby intends to exercise its superior right to possess the premises.

Accordingly, you are directed to vacate the above-named premises on or before June 31, 1993. If you fail to do so, due course of law shall be employed to evict you.

Resolution Trust Corporation as Receiver
for Home Owners Savings Bank F.S.B.,
By its attorneys,

BARRON & STADFELD, P.C.

_____

Denise L. Page
B.B.O. #119415
Two Center Plaza
Boston, MA 02108
(617) 723-9800

Date: _____

11835-112-2

Nos. 93-1748 and 93-1757

Supreme Court, U.S.
FILED
JUN 28 1994
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LILLIAN SOLOMON, *et al.*,

Petitioners,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.,

Respondent.

SUSAN SOLOMON PATTULLO, *et al.*,

Petitioners,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A.,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF REPRESENTATIVES GARY L. ACKERMAN, SHERWOOD L. BOEHLERT, ELIOT L. ENGEL, HAMILTON FISH, JR., FLOYD H. FLAKE, MAURICE D. HINCHEY, NITA M. LOWEY, CAROLYN B. MALONEY, THOMAS J. MANTON, JERROLD NADLER, MAJOR R. OWENS, CHARLES B. RANGEL, CHARLES E. SCHUMER, JOSE E. SERRANO, EDOLPHUS TOWNS, AND NYDIA VELAZQUEZ AS AMICI CURIAE SUPPORTING PETITIONERS

CHARLES A. MILLER
ROBERT A. LONG, JR.*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

**Counsel of Record*

22 pp

QUESTION PRESENTED

Whether 12 U.S.C. § 1821(e) (Supp. V 1993), which authorizes the Resolution Trust Corporation to "repudiate any contract or lease" to which a failed savings and loan institution is a party, preempts state rent control laws that protect statutory tenants from eviction.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO. 93-1748

LILLIAN SOLOMON, *ET AL.*, PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., RESPONDENT

NO. 93-1757

SUSAN SOLOMON PATTULLO, *ET AL.*, PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF REPRESENTATIVES GARY L. ACKERMAN, SHERWOOD L. BOEHLERT, ELIOT L. ENGEL, HAMILTON FISH, JR., FLOYD H. FLAKE, MAURICE D. HINCHEY, NITA M. LOWEY, CAROLYN B. MALONEY, THOMAS J. MANTON, JERROLD NADLER, MAJOR R. OWENS, CHARLES B. RANGEL, CHARLES E. SCHUMER, JOSE E. SERRANO, EDOLPHUS TOWNS, AND NYDIA VELAZQUEZ AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae are members of the United States House of Representatives who represent citizens of the State of New York. The *amici* have a strong interest in ensuring that New York citizens who are protected by the State's rent-control and rent-stabilization laws are not evicted from their homes. In addition, the *amici* have an interest in the proper interpretation of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183. Federal courts should not lightly conclude that Congress has preempted state laws that address important and traditional issues of local concern such as the regulation of housing. As discussed below, the provision of FIRREA that confers on the Resolution Trust Corporation ("RTC") authority to "repudiate any contract or lease" of a failed savings and loan institution should not be interpreted to permit the RTC to extinguish rights of statutory tenants that are conferred by state law and that cannot be altered by a contract or lease.

STATEMENT

1. From 1946 to the present, the State of New York has enacted a series of laws to address a persistent housing emergency in New York City and other parts of the State. New York law currently provides for two types of rent regulation, rent control and rent stabilization. See N.Y.C. Admin. Code §§ 26-401 to 26-415 & 26-501 to 26-520. Under both types of regulation, rent increases are governed by statute, and tenants may not be evicted except in circumstances specified by law. Pet. App. 5a-7a.[1/]

[1/] References to "Pet. App." in this brief refer to the appendix to the petition for a writ of certiorari in No. 93-1757.

Under New York's rent control laws, tenants are protected "notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto." N.Y.C. Admin. Code § 26-408.a (1992). Tenants subject to the rent stabilization laws enjoy similar protection. Although the rent stabilization laws, unlike the rent control laws, contemplate the use of leases as a mechanism for increasing rents, the absence of a lease merely prevents the landlord from increasing the rent and does not affect the tenants' rights under state law. See N.Y. City Rent Stabilization Code § 2522.5(b)(2).

2. Petitioners include the Attorney General of the State of New York, the State's Division of Housing and Community Renewal ("DHCR") and its Commissioner, and rent-controlled or rent-stabilized tenants who reside in a building at 444 East 57th Street in New York City. In 1983, the building was converted from rental apartments to condominiums pursuant to a "non-eviction" plan under New York's Martin Act, N.Y. Gen. Bus. Law § 352-eeee(2)(c) (McKinney 1987). In accordance with that Act, the tenants were notified that they could elect not to purchase their apartments, and if they made that choice they had the right to continue as statutory tenants protected by New York's rent control and rent stabilization laws. Petitioners chose not to purchase their apartments. Pet. App. 8a-9a.

In 1984, the owner of the building pledged nine apartments to Nassau Federal Savings and Loan Association as collateral for a loan of $3.2 million. The owner defaulted in 1987, and title to the nine apartments passed to Nassau. Nassau encountered financial difficulties, and in March 1990 the Office of Thrift Supervision ("OTS") appointed the RTC

as receiver for Nassau. The OTS subsequently ordered that Nassau be closed and directed the RTC to dispose of its assets. Pet. App. 9a.

The nine apartments were appraised at $2,837,400 subject to the existing tenancies (slightly less than the outstanding loan balance of $3,035,711), or $7,565,000 if the tenants could be removed. R. 233. In the summer of 1990, the RTC determined that the nine tenancies were burdensome, and sent letters to each tenant notifying them that it was repudiating their tenancies pursuant to 12 U.S.C. § 1821(e)(1) (Supp. V 1993).[2/] The letters informed the tenants that they had the option of treating the tenancy as terminated, remaining in possession for the balance of the lease, or purchasing their apartment on stated terms. Pet. App. 9a-10a.

The tenants disputed the agency's power to repudiate the tenancies. Several tenants filed complaints with petitioner DHCR, and New York's Attorney General protested by letter that the RTC had no authority to repudiate tenancies protected by New York law. In response, the RTC issued a statement

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[2/] Section 1821(e)(1) provides:

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease --
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote an orderly administration of the institution's affairs.

announcing that, as a matter of policy, it will not repudiate the leases of tenants whose income does not exceed 115% of the median income in New York City. Pet. App. 10a-11a.

3. In February 1991, the RTC brought a declaratory judgment action against the Attorney General of New York, the Commissioner of the DHCR, and the nine individual tenants, seeking to establish that it has authority under § 1821(e)(1) to repudiate the tenants' leases. Shortly thereafter, the State of New York brought a separate action challenging the RTC's authority to disregard New York statutes that regulate the rights of rental tenants. Pet. App. 11a.

The district court consolidated the two actions and granted New York's motion for summary judgment. Pet. App. 36a-58a. The court held that the RTC lacked authority under 12 U.S.C. § 1821(e)(1) to repudiate the tenancies. The court reasoned that the "presumption against preemption applies especially where the state law said to be preempted is within the traditional police powers of the states." Pet. App. 42a (citing *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983)).

The court rejected the RTC's argument that the "any contract or lease" language of § 1821(e)(1) applies to the statutory tenancies at issue in this case. The court held that the phrase "contract or lease" "does not include rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant." Pet. App. 51a. The court explained that, under New York law, tenants "enjoy a protection from eviction that is independent of any lease that may exist between landlord and tenant." *Id.* at 45a.

The court further concluded that "while rent-stabilized tenants, unlike rent-controlled tenants, do hold leases . . .

[t]he leases merely provide a means for periodically increasing the rents landlords are allowed to charge." Pet. App. 46a (citations omitted). Thus, "even if RTC repudiated the leases of rent-stabilized tenants, . . . those tenants would still enjoy statutory rights to remain in possession of their apartments indefinitely and without a rent increase." *Id.*

4. The court of appeals reversed. Pet. App. 1a-35a. The court stated that "[t]his appeal . . . turns on whether the tenancies in question are contractual in nature," Pet. App. 14a, and that "[f]or these purposes, the definition of the phrase 'contract or lease' is a matter of federal law." *Id.* at 15a (citations omitted). The court added, however, that it would "consult for guidance the body of New York law concerning the design and operation of the rent regulation programs at issue." *Id.*

The court held that "New York's statutory tenancies . . . are contract based leaseholds" that "fall within the express language of § 1821(e)." Pet. App. 22a. The court acknowledged that "New York's rent stabilization laws regulate the two terms at the core of the landlord-tenant relationship: rent and duration." *Id.* at 17a. The court nevertheless concluded that "the tenancy retains much of the character of a voluntary contract," and therefore is subject to § 1821(e). *Id.* at 18a.

Although the court recognized that "New York's rent control statute does not contemplate or require a current written lease," *id.*, it cited authority for the proposition that some of "the terms of the last written lease continue to remain in effect under rent control," Pet. App. 19a-20a (citations omitted), and concluded that "[r]ent control, like rent stabilization, affects the lease by statutorily altering and specifying certain terms." *Id.* at 21a.

The court also rejected petitioners' argument that they are entitled to remain in their apartments under 12 U.S.C. § 1821(e)(5)(A)(ii), which provides that a tenant may "remain in possession of the leasehold interest for the balance of the term of the lease." The court acknowledged that New York's statutory tenancies do not run for any specified term, but viewed the landlord's statutory right to review the maximum base rent once every two years as "analogous" to a lease term, and therefore held that the term of petitioners' statutory tenancies for purposes of FIRREA is two years. Pet. App. 26a-29a.[3/]

REASONS WHY THE PETITION SHOULD BE GRANTED

1. This case presents an issue of great importance to the State of New York and its citizens. New York has adopted rent control and rent stabilization laws to address a public housing emergency in New York City and elsewhere in the State. See N.Y.C. Admin. Code §§ 26-401, 26-501. The court of appeals' decision undermines the State's ability to regulate the housing of its own citizens. As a result of the court of appeals' decision, many individuals and families now face a risk of eviction from their homes despite New York

---

[3/] The court also rejected petitioners' arguments that the leases are not burdensome, Pet. App. 29a-30a, that the RTC had violated its duty to consider the impact of its action on local communities, *id.* at 30a-31a, and that repudiation of the statutory tenancies is a taking of property without just compensation, *id.* at 32a. Because the court concluded that § 1821(e) expressly authorizes the RTC to repudiate the tenancies, it did not address whether there is a conflict between FIRREA and New York's rent control laws. *Id.* at 32a-33a. Finally, the court held (*id.* at 33a-34a) that the district court properly refused to grant summary judgment on Petitioner Ribner's claim that he holds his statutory tenancy by succession from his mother. *Id.* at 33a-34a.

laws that grant them a right to remain in their apartments indefinitely.[4/]

The questions presented are also of national importance. Approximately ten percent of all rental housing units in the United States are subject to some form of rent control. See U.S. Dep't of Housing and Urban Development, Office of Policy Development and Research, *Report to Congress on Rent Control* 1 (1991). In addition, the court of appeals' decision has broad implications for other state laws that may be connected in some way to a contract or lease. For example, the court of appeals' decision supports the conclusion that the RTC need not comply with state laws setting minimum standards for landlords as long as it first repudiates the tenants' leases. See Pet. App. 16a (discussing warranty of habitability).

2. This Court has granted review to resolve conflicting interpretations of related or similar statutory provisions. See *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). The court of appeals' decision creates two such conflicts.

a. The court of appeals' interpretation of the statutory terms "any contract or lease" conflicts with decisions of two other courts of appeals interpreting the functionally identical term "agreement" in a related statutory provision, 12 U.S.C.

[4/] As of February 1991, the RTC controlled approximately 1,000 rent-regulated apartments in the State of New York, and expected an additional 1,000 rent-regulated apartments to come under its control within the next year. See Pet. App. 52a n.5. In addition, the FDIC owns many apartments in New York that are subject to the court of appeals' ruling.

§ 1823(e) (Supp. V 1993).[5/] In *Patterson* v. *FDIC*, 918 F.2d 540 (1992), the Fifth Circuit held that § 1823(e) did not prevent a Texas resident from asserting a homestead claim as a defense against foreclosure by the FDIC. Although the deed of trust contained an express disclaimer of rights under Texas law, 918 F.2d at 541, the court reasoned that the "homestead right exist[s] independent of any agreement between the parties," and that the term "agreement" in § 1823(e) could not be construed to permit the FDIC to abrogate rights conferred by state law. 918 F.2d at 543-44 (internal quotation omitted). In reaching this conclusion, the Fifth Circuit rejected the government's contention that it could not consider state law in defining the term "agreement" under § 1823(e). Applying the three-factor test of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the court "decline[d] to establish federal common law that would abrogate the well-established Texas law . . . protecting its citizens' homesteads." 918 F.2d at 544.

[5/] Section 1823(e) provides:

> No *agreement* which tends to diminish or defeat the interest of the [RTC] in any asset acquired by it under this section . . . either as security for a loan or by purchase . . ., shall be valid against the [RTC] unless such an agreement --
>
> (1) is in writing,
>
> (2) was executed by the [bank] and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the [bank],
>
> (3) was approved by the board of directors of the [bank] or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the [bank].

12 U.S.C. § 1823(e) (emphasis added). This statute codifies the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942).

Similarly, in *Bateman* v. *FDIC*, 970 F.2d 924 (1st Cir. 1992), the First Circuit held that § 1823(e) did not deprive a contractor of the benefit of a mechanic's lien on property subject to a preexisting mortgage. Chief Judge Breyer's opinion for the court applied state law, in accordance with the principle that "state law will govern matters such as priorities (within the context of a relevant federal program) unless a need for national uniformity, or a need to protect the federal program's objectives, outweighs the commercial confusion (and unfairness) that abandoning ordinary state property law might cause." 970 F.2d at 928 (citation omitted).

b. The court of appeals' decision also conflicts with decisions interpreting 11 U.S.C. § 365(a) (1988), a provision of the Bankruptcy Code that authorizes bankruptcy trustees to repudiate any "contract" or "lease." 11 U.S.C. § 365(a).[6/] As the court of appeals recognized, § 1821(e) is "closely modeled on parallel provisions of section 365 of the Bankruptcy Code." Pet. App. 25a (quoting S. Rep. No. 19, 101st Cong., 1st Sess. at 314 (1989)). See also *1185 Ave. of the Ams. Assocs.* v. *RTC*, No. 93-7810, 1994 U.S. App. Lexis 8732 at *10 (2d Cir., Apr. 26, 1994) (describing similarities between a trustee in bankruptcy and the RTC as conservator or receiver). The Seventh Circuit has held that a bankruptcy trustee must comply with state rent control laws even after a lease is repudiated by the trustee under § 365. *In re Chicago, R.I. & Pac. R.R.*, 772 F.2d 299, 302-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). See also *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823, 827 (D.C. Cir. 1988) (bankruptcy trustee's power to repudiate a "contract" or "lease" under § 365 does not "implicate public obligations,"

[6/] Section 365(a) provides that, with stated exceptions, "the trustee. . . may assume or reject any executory contract or unexpired lease of the debtor."

but extends only to "lease covenants [that] go beyond the requirements of law.") This is consistent with the general principle, also recognized by the courts of appeals, that state law determines whether a legal interest falls within the definition of a "contract" or "lease" for purposes of § 365. See *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989).[2/]

c. The court of appeals' decision also conflicts with decisions of this Court. "Consideration of issues under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Indeed, this Court recently stated that "[t]o displace traditional State regulation . . ., the federal statutory purpose must be clear and manifest," and that absent such a clear and manifest purpose, federal law "will be construed to adopt, rather than to displace, pre-existing state law." *BFP* v. *RTC*, No. 92-1370, slip op. 13-14 (May 23, 1994) (internal quotations and citations omitted). The district court's decision expressly

---

[2/] The court of appeals distinguished § 365 on the basis of 11 U.S.C. § 365(h)(1) (1988), which provides that "[i]f the trustee rejects an unexpired lease of real property . . .the lessee . . . may remain in possession of the leasehold . . . for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee . . . under applicable nonbankruptcy law." See Pet. App. 24a-25a. But that provision does not state that "nonbankruptcy law" determines what is a "contract" or "lease" under Section 365(a), and the courts of appeals have not relied on Section 365(h)(1) in concluding that "contract" or "lease" refers to state law.

relied on this settled principle, see Pet. App. 42a, but the court of appeals simply ignored it.

The court of appeals' decision is also contrary to decisions of this Court holding that when Congress uses a term that is "deeply rooted in state traditions, customs, habits, and laws," the courts should adopt state law to define the term. *RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946). See, *e.g.*, *United States* v. *Brosnan*, 363 U.S. 237, 240-42 (1960) (applying state law to define "real property" and "property and rights to real property"). The reasons for adopting state law are "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991).

Finally, the court of appeals' decision is in sharp tension with at least four aspects of this Court's recent decision in *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994) (holding that state law, rather than federal law, governs tort actions brought by the FDIC as receiver of a federally-insured bank against attorneys who provided services to the bank). First, *O'Melveny* unanimously rejected the government's contention that "federal law governs questions involving the rights of the United States arising under federal programs." Slip op. 5. The Court observed that "the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of [the bank]." *Id.* at 5-6 (emphasis in original). Second, the Court concluded that the statutory provision at issue in *O'Melveny* — which provided that the FDIC or the RTC, as receiver, "succeed to . . . all rights . . . *of the insured depository institution*." 12 U.S.C. § 1821(d)(2)(A)(i) (Supp. V 1993) (emphasis added) — "places the FDIC in the shoes of the insolvent S&L, to work

out its claims under state law." Slip op. 7. A parallel analysis applies to § 1821(e)(1), which refers to "any contract or lease . . . *to which such [insured depository] institution is a party*." (Emphasis added). Third, the Court's opinion in *O'Melveny* stated that it would not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed," because "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." Slip op 6 (citing authorities). That principle applies here, because FIRREA "left unaddressed" the definition of "contract or lease," terms that have settled meanings under state law. Fourth, the Court flatly rejected the FDIC's argument that courts should consider whether applying state law would "deplet[e] the deposit insurance fund." Slip op. 9 (internal quotation omitted). The court of appeals, in contrast, appears to have been influenced by precisely that concern. See Pet. App. 26a (finding "every reason for Congress to strengthen RTC's hand in remedying a national economic emergency").

3. The text and structure of FIRREA indicate that Section 1821(e) was intended to provide the RTC with protection from agreements made by the savings institution, but not from generally applicable laws of the State. First, Congress demonstrated that it knew how to preempt state law when it wanted to do so. It included a number of express preemption provisions in FIRREA, but did not include such a provision § 1821(e). See, *e.g.*, 12 U.S.C. §§ 1464(p), 1821(m)(10), 1823(k)(1)(A)(i). Second, Congress defined a variety of terms used in FIRREA, but it did not adopt a federal definition of the terms "contract" or "lease." See 12 U.S.C. § 1813 (1988; Supp. V 1993). Third, the legislative history states that FIRREA "grants the FDIC [and the RTC] as conservator or receiver certain rights and powers of a receiver in equity, including the right to repudiate contracts." H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 397 (1989).

As explained above, see pp. 10-11 *supra*, a receiver in equity has no power to evict tenants protected by State rent control laws.

If the court of appeals had properly applied New York law, it would have concluded that petitioners' rights as statutory tenants do not arise under a "contract or lease." Under New York law, it is well-settled that the rights of statutory tenants are not contractual in nature. See *Whitmarsh* v. *Farnell*, 83 N.E.2d 543, 547 (N.Y. 1949) (tenant's "occupancy of the apartment after his lease expired was not under any agreement express or implied but by virtue of a compulsion exerted on the landlord by the local emergency rent law"); *Stern* v. *Equitable Trust Co.*, 144 N.E. 578, 578 (N.Y. 1924) (same); *Park Summit Realty Corp.* v. *Frank*, 434 N.Y.S.2d 73 (App. Div. 1980) (same), *aff'd*, 448 N.Y.S.2d 414 (App. Div. 1981), *aff'd*, 439 N.E.2d 358 (N.Y. 1982); *De Santis* v. *White Rose Assocs.*, 578 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 1991) (same).

Moreover, the court of appeals' definition of the term of petitioners' lease is contrary to New York law, which provides that statutory tenancies last "so long as [the tenant] continues to pay the rent." N.Y.C. Admin. Code § 26-408a; see *130 W. 57 Corp.* v. *Hyman*, 66 N.Y.S.2d 332, 334 (App. Div. 1946) ("So long as a tenant continues to pay the rent . . . he may not be removed from the premises").[8/]

4. In the alternative, the Court may wish to grant the petitions for certiorari, vacate the decision of the court of

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[8/] The court of appeals' decision is also internally inconsistent. The court held that a statutory tenancy is a "lease" for purposes of 12 U.S.C. § 1821(e)(1), but that the term of the statutory tenancy is not the term of the lease for purposes of § 1821(e)(5). See Pet. App. 22a, 26a-29a.

appeals, and remand for further consideration in light of this Court's recent decisions in *BFP* v. *RTC*, No. 92-1370 (May 23, 1994) and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13 1994). As noted above, see p. 11 *supra*, the Court's opinion in *BFP* contains a particularly strong statement of the principle that "where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation." Slip op. 15. The court of appeals failed to discuss that principle at all; it might well reach a different result upon reconsideration in the light of *BFP*. *O'Melveny*, as noted above, see pp. 12-13 *supra*, construed a provision of FIRREA with a parallel structure, applied a presumption that matters not addressed by FIRREA are left to state law, and rejected the argument that the powers of the FDIC and the RTC should be defined to further a federal interest in avoiding "deplet[ion] of the deposit insurance fund." Slip op. 9. Each of those features of *O'Melveny* undermines the court of appeals' decision in this case, and suggests that the court of appeals might reach a different result upon reconsideration.

CONCLUSION

The petitions for a writ of certiorari should be granted. In the alternative, the petitions should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in light of this Court's decisions in *BFP* v. *RTC*, No. 92-1370 (May 23, 1994) and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994).

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No. 93-1748

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LILLIAN SOLOMON, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
as Receiver for Nassau Savings and
Loan Association, F.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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1. The RTC cannot and does not dispute that this is a case of profound nationwide practical importance. This case was chosen by RTC's Board of Directors as a "precedent setting" vehicle to establish throughout the country the RTC's power, in its own words, "to preempt state law in the area of rent control and rent stabilization." R. 269. RTC, and its sister agency, FDIC, thus stand poised if certiorari is denied to begin the evictions not only of 93-year old Lillian Solomon from her family home of 32 years, and the other petitioners, but also thousands of other rent-controlled tenants in New York and a substantial number of other states. See Pet. 7, 12; Brief of

Amicus Curiae City of Boston, at 1-2.[1] This Court may well not consider another case in the upcoming Term that directly and dramatically affects so great a number of Americans. The broad impact that this Court's certiorari determination will have strongly supports each of the alternative forms of relief sought by petitioners, which are discussed below.

2. At a minimum, the Court should grant certiorari, vacate the decision of the Second Circuit preempting New York's rent control laws, and remand the case for reconsideration in light of *BFP* v. *RTC*, 114 S. Ct. 1757 (1994), and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994).

a. Like the Second Circuit, the RTC simply ignores the legal standard of *BFP*, pursuant to which 12 U.S.C. § 1821(e) can be construed to preempt state real property law only if the intent to do so is "unambiguous." 114 S. Ct. at 1765; *see id.* (no preemption "where the intent to override is doubtful"); *id.* (purpose to preempt "must be 'clear and manifest' "). The failure of the Second Circuit to employ the correct preemption standard set forth in this Court's subsequent *BFP* decision, by itself, justifies a remand.

It is equally evident that applying the *BFP* standard, Section 1821(e) does not preempt New York's rent control laws. Under *BFP*, to justify preemption, RTC must show that it was the *unambiguous* intent of Congress

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[1] As amply demonstrated by the Brief of Legal Services for New York City, *et al.*, As *Amici Curiae*, at 16-17, RTC and FDIC could further extend their eviction policy to low-income tenants at any time. Moreover, RTC does not dispute that under the express rationale of the Second Circuit's decision, 12 U.S.C. § 1821(e) preempts state statutory and common law obligations to provide essential services as well as the warranty of habilitability, which harms all tenants regardless of wealth. Pet. App. 14a, 16a. *Cf. Forbes* v. *FDIC*, 1994 U.S. Dist. LEXIS 8682 (D. Mass. April 29, 1994) (citing Second Circuit's decision, FDIC contends that it does not have to comply with service and safety obligations of state housing code).

both: (1) to create a federal law definition for the term "contract or lease"; and (2) that such a federal definition reaches obligations imposed by state housing laws that are not created and cannot be altered by any agreement, contract, or lease. Neither proposition is supportable.

First, there could be no preemption if New York law were used to define what is a "contract or lease" because New York law squarely (and repeatedly) holds that the rights of occupancy of both rent-controlled and rent-stabilized tenants are *"not pursuant to any agreement* with the owner but *solely* by virtue of the emergency rent laws." *DeSantis* v. *White Rose Assocs.*, 578 N.Y.S. 2d 363, 367 (N.Y. Sup. Ct. 1991) (emphasis added). Petitioners cited three additional cases to the exact same effect. See Pet. 21 & n. 13.[2]

RTC does not even address these decisions, preferring to assume that, if it states that no New York court decision addresses whether rent control obligations are independent of the contract or lease often enough, then it will be so. See Resp. 7, 8, 11. Even more ludricrous is RTC's suggestion that the Second Circuit used state law to "determin[e] the meaning of the reference to a 'lease' in Section 1821(e)" and that this Court should defer to this purported interpretation of state law by the Second Circuit. Resp. 15. What the Second Circuit actually held was: "[T]he definition of the phrase 'contract or lease' is a matter of federal law . . . . *[W]e are not bound by any state court pronouncements regarding the breadth or scope of these terms* . . . ." Pet. App. 13a (emphasis added).[3]

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[2] Indeed, this answer is compelled by New York statutory provisions that explicitly state that rent control obligations apply "notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated." N.Y. City Rent Control Law § 26-408.a; *see also* Pet. 8-9. Lillian Solomon, for example, *has no lease*.

[3] Of course, deference here should properly be accorded to the New York Attorney General's interpretation of state law. His petition convincingly demonstrates that under New York law statu-

Neither the Second Circuit nor the RTC can show, and neither attempts to show, the unambiguous intent of Congress that is necessary under *BFP* to have the federal courts create a federal law definition of the term "contract or lease" in Section 1821(e) that preempts state law. All the indicia support adopting state law for the definition:

(1) FIRREA contains an extensive section of federal definitions for 50 terms used in the statute. See 12 U.S.C. § 1813. Congress omitted a federal definition of "contract or lease." As this Court recently held, "matters left unaddressed [by FIRREA] are presumably left subject to the disposition provided by state law." *O'Melveny & Myers* v. *FDIC*, No. 93-489, slip op. at 6 (June 13, 1994).

(2) Section 1821(e) refers to any "contract or lease . . . *to which such institution is a party*." (Emphasis added.) In *O'Melveny & Myers*, this Court held that similar phraseology—"rights . . . *of the insured depository institution*" in 12 U.S.C. § 1821(d)(2)(A)(i)—required the courts to apply state law because state law indisputably governed the rights of the institution "prior to receivership." Slip op. at 6-7. So too here. Only state law can answer whether the obligation of an institution as landlord "prior to receivership" was imposed by contract or lease.

(3) The very words "contract or lease," particularly as applied here to real property, are traditionally governed and defined by state law. This Court has adopted state law to define similar terms when they appear in federal statutes. *See, e.g., RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946) ("real property"); *Butner* v. *United States*, 440 U.S. 40, 55 (1979) ("the interest of

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tory tenancy obligations are independent of any contract or lease. *See* 93-1757 Pet. 4, 13-14. If there were any doubt, on remand, the Second Circuit can certify the appropriate issue to the New York Court of Appeals. *See* Pet. 22 n.14.

a mortgagee in rents earned by mortgaged property"). Indeed, *BFP* itself emphasizes that the regulation of real property is perhaps the quintessential area where federal statutes should be construed to defer to and, indeed, "to adopt, rather than to displace, pre-existing state law." 114 S. Ct. at 1764-65. Obviously, the Second Circuit refused to do that here.[4]

Second, even if a federal definition were appropriate for "contract or lease" in Section 1821(e), neither the Second Circuit nor RTC has demonstrated unambiguous Congressional intent—as required by *BFP*—that such a definition be stretched to include obligations imposed by state real property law even when there is no contract or lease or when the contract or lease provides to the contrary. RTC and the Second Circuit both seek to stretch the term "contract or lease" to include obligations imposed by state statute on parties to a relationship that is "ultimately based on a lease or other voluntary contractual arrangement" even though those obligations are not set forth in and indeed contradict some long-ago contract or lease. Resp. 8 (quoting Pet. App. 15a). Even if this were a reasonable interpretation of "contract or lease," not even RTC (or the Second Circuit) can contend that it is the only reasonable interpretation, which is what *BFP* requires for preemption. Compare Resp. 7 ("the court of appeals' conclusion . . . is *a* reasonable one") (emphasis added).

Numerous factors support a contrary construction. (1) RTC concedes that the natural meaning of "contract

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[4] The cases cited by RTC do not involve traditional state-law terms. *See* Resp. 9-10. In particular, *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985), involved the definition of personal property, not real property, in a tax-collection statute. This Court has emphasized that unique considerations of uniformity and revenue raising support judicial creation of federal law to vindicate the interests of the United States in tax collection and that these considerations do *not* apply to the interests of federal insurers such as RTC. *See O'Melveny & Myers* v. *FDIC*, No. 93-489, slip op. at 8-9 (June 13, 1944); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729-32, 735-37 (1979).

or lease" is an obligation created by agreement. Resp. 7; see Pet. 23-24. Here, New York's statutory tenancy obligations are created by state law notwithstanding the absence of any current lease agreement, or the presence of a current lease provision to the contrary. See Pet. 8-9. (2) The language of other provisions in Section 1821(e) plainly evinces congressional understanding that the statute reaches only obligations imposed by the lease or contract itself. See, *e.g.*, § 1821(e)(5)(A) ("term of the lease"); § 1821(e)(5)(B)(i)(I) ("contractual rent"). (3) Prior to the adoption of FIRREA, courts had construed "contract" or "lease" in 11 U.S.C. § 365(a) not to preempt state rent control and other housing laws. *See infra* pp. 8-9. (4) This Court's decisions similarly express the understanding that state statutory obligations imposed on parties to a contract cannot be equated with or considered part of the agreement of the parties. See *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2622 & n.24 (1992); *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1109-11 (1992). RTC does not dispute that these cases so hold, but instead states that "[t]he court of appeals' analysis did not treat obligations imposed under [New York's rent regulation laws] as part of the contract." Resp. 12. Once again, the express language of the Second Circuit's decision belies RTC's attempts to refashion it. See Pet. App. 19a ("Rent control, like rent stabilization, affects the lease by statutorily altering and *specifying certain terms*, chiefly by granting the tenant a statutory renewal option.") (emphasis added); *id.* at 14a (state law obligations imposed on landlords are "read . . . into residential-lease contracts").[5]

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[5] Petitioners previously demonstrated that RTC's broad interpretation of "contract or lease" in Section 1821(e) would also improperly create a taking of petitioners' state-law created property interests under *Armstrong* v. *United States*, 364 U.S. 40, 48-49 (1960). Pet. 26 & n.16. RTC's sole response is that this is a "reorganization" case. Resp. 13. This ignores the settled law that actions taken in a federal reorganization proceeding are "subject to the

In sum, RTC cannot dispute that *BFP* satisfies what the government itself has set forth as the appropriate basis for a remand: that "it is possible that [*BFP*] . . . . will shed light on the proper analysis to be used in deciding this case." Pet. 20 (citation omitted). Indeed, *BFP* does much more—it strongly supports reversal of the decision below.

b. This case should also be remanded for reconsideration in light of *O'Melveny & Myers*. Petitioners' Supplemental Brief sets forth three stark conflicts between *O'Melveny* and the decision below. Supp. 3-4. The RTC simply ignores the first two. See Resp. 15; compare *supra* p. 4. As to the third conflict—the Second Circuit's expressed desire to enable RTC to recover "more money," compare *O'Melveny*, slip op. 9—the RTC's only response is that the Second Circuit only relied on the "more money" argument in interpreting Section 1821 (e)(5). This argument is both puzzling and wrong. It is puzzling because, at a minimum, the Second Circuit should reconsider its erroneous construction of that provision, which RTC makes no effort to defend. Compare Pet. 23 n.15. The RTC is wrong because the discredited "more money" rationale permeates the Second Circuit's interpretation of Section 1821(e)(1) as well. *See* Pet. App. 12a (interpretation designed to create "a tool for maximizing net asset values"); *id.* at 23a (expressing desire "to strengthen RTC's hand in remedying a national economic emergency"). *O'Melveny* thus directly undermines a proposition vital to the decision below. This alone strongly supports remand.

3. The profound practical importance combined with the serious conflicts with decisions of this Court provide ample basis for this Court to exercise plenary review.

Fifth Amendment's prohibition against taking private property without compensation." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 75 (1982).

Conflicts between the decision below and decisions of other circuit courts further support plenary review.

a. RTC does not dispute that 12 U.S.C. § 1821(e) and 11 U.S.C. § 365(a) are sufficiently similar and related that conflicts in interpretation of these provisions warrant review by this Court. *Cf. Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). Two such conflicts exist.

i. Circuits courts, contrary to the decision below, have adopted state law to define what is a "contract" or "lease" under 11 U.S.C. § 365(a). Notwithstanding RTC's protestations, the language of the decisions creating this conflict is plain and unequivocal. See, *e.g.*, *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990) ("state law determines whether these contracts constitute unexpired leases subject to Section 365"); *In re Harris Pine Mills*, 862 F.2d 217, 220 n.5 (9th Cir. 1988) ("what constitutes a lease . . . , depends on state law, not on the Bankruptcy Code").

ii. RTC concedes that *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823 (D.C. Cir. 1988), and *In re Chicago, R.I. & Pac. R.R.*, 772 F.2d 299 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), are cases where it was held that state rent control or other housing laws supplied the terms and conditions for tenancies that continued after rejection of the lease. Resp. 13-14. But that is precisely this case. RTC can repudiate whatever lease agreement exists with a given tenant;[6] but even the Second Circuit concedes that after rejection of a lease agreement, Section 1821(e) provides for the tenant to remain for some period of time at some rent. See Pet. App. 24a-26a. *Saravia* and *Rock Island* hold that the terms and conditions of that continued tenancy—which include duration and rent—must comply with state statutory obligations imposed on all landlords. As *Saravia*

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[6] Of course, Lillian Solomon does not even have a lease to repudiate.

held: "[T]he public obligations imposed by [state] law are simply not implicated by the right of rejection. Rejection of the leases did no more than release the debtor from the contractual obligations undertaken in those leases. The debtor does not cease to be a landlord simply by virtue of rejection of the leases, and there is no reason to exempt the [debtor] from obligations imposed by local law on all landlords." 844 F.2d at 826-27; see also *id.* at 827 ("the obligations imposed by [state statute] . . . are independent of private leases."). Of course, the Second Circuit held precisely the opposite. See Pet. App. 20a. Cementing the conflict is the fact that *Saravia* expressly relied on a prior lower court decision holding that the term "contract" or "lease" in 11 U.S.C. § 365(a) did not preempt *New York's* rent control laws. *See* 844 F.2d at 826 (citing *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986)).

b. *Bateman* v. *FDIC*, 970 F.2d 924, 927-28 (1st Cir. 1992) (Breyer, C.J.), and *Patterson* v. *FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1990), hold that obligations imposed by state law do not fall within the word "agreement" under 12 U.S.C. § 1823(e). RTC concedes that the words "contract or lease" under Section 1821(e) go no further than obligations "derived from . . . an agreement." Resp. 7. But RTC contends that this case is distinguishable from *Bateman* and *Patterson* because in this case the relationship "commence[d] with an agreement." Resp. 13. The problem for RTC is that the relationship in *Patterson* also commenced with an agreement (a mortgage), see 918 F.2d at 541, and the relationship in *Bateman* commenced with the owner's consent that the contractor do work, see 970 F.2d at 927. *Patterson* and *Bateman* thus squarely hold that obligations imposed by state law on parties to a relationship are not part of an "agreement" under FIRREA simply because the relationship was commenced by agreement or consent. As RTC concedes (Resp. 13), the decision below holds to the contrary.

For the foregoing reasons, and those previously stated, the petition should be granted. In the alternative, the petition should be granted, the decision below vacated, and the case remanded for reconsideration in light of *BFP* v. *RTC*, 114 S.Ct. 1757 (1994), and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994).

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